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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 318, 323 and 409

JOHN A. BURNS, Governor of the State of Hawaii,
Appellant,

—v.—

WILLIAM S. RICHARDSON, *et al.*,
Appellees.

ELMER F. CRAVALHO, *et al.*,
Appellants,

—v.—

WILLIAM S. RICHARDSON, *et al.*,
Appellees.

KAZUHISA ABE, *et al.*,
Appellants,

—v.—

WILLIAM S. RICHARDSON, *et al.*,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

BRIEF FOR JOHN A. BURNS, GOVERNOR OF THE STATE OF HAWAII

BERT T. KOBAYASHI
Attorney General
State of Hawaii

BERTRAM T. KANBARA
NOBUKI KAMIDA
Deputy Attorneys General
State of Hawaii
Iolani Palace Grounds
Honolulu, Hawaii 96813

THURMAN ARNOLD
DENNIS G. LYONS
JOHN T. RIGBY
BROOKSLEY ELIZABETH LANDAU
1229 Nineteenth Street, N.W.
Washington, D. C. 20036
Attorneys for John A. Burns, Governor of the State of Hawaii

Of Counsel:

ARNOLD & PORTER
Washington, D. C.

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OPINIONS BELOW

The opinion of the District Court dated February 17, 1965, and entered April 9, 1965, is reported at 238 F. Supp. 468, and appears at R. 62-81. Its opinion dated April 28, 1965, is reported at 240 F. Supp. 724 and appears at R. 151-65. In addition, a short unreported opinion of the District Court, dated March 9, 1965, granting a motion to alter or amend the judgment of February 17, 1965, appears at R. 88-91; and an informal memorandum opinion, dated March 31, 1965, is attached as Appendix B hereto, pp. 28a-29a, *infra*.[1]

JURISDICTION

The basis of jurisdiction in the District Court was the Civil Rights Act, 42 U. S. C. §§ 1983, 1988, and 28 U. S. C. § 1343. Pursuant to 28 U. S. C. §§ 2281 and 2284, a three-judge District Court was convened.

The jurisdiction of this Court rests on 28 U. S. C. §§ 1253 and 2101(b). The first of the orders of the District Court from which the appeal is taken was dated February 17, 1965, but was not entered until April 9, 1965 (R. 195); the second was dated and entered on April 28, 1965. (R. 197) The essential portions of the first order had been stayed and reopened by the District Court in response to a timely motion, (R. 88-91) and were not reinstated until April 28, 1965. (R. 164) The notice of appeal in No. 318 was filed on May 3, 1965 (R. 165), and the notices of appeal in Nos. 323 and 409 were filed on May 7, 1965 (R. 180, 184); notices all were timely as to both the February and April orders. See *United States* v. *Crescent Amusement Co.*, 323

[1] This informal memorandum opinion was circulated among the judges of the District Court and released to the parties.

U. S. 173, 177 (1944); *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203, 205-06 (1943); *Zimmern* v. *United States*, 298 U. S. 167, 169 (1936). See also 28 U. S. C. § 2101; Fed. R. Civ. P. 58; *United States* v. *Hark*, 320 U. S. 531, 534 (1944).[2]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the United States Constitution, Amendment XIV, Section 1; the Hawaii Constitution, Article III, Sections 1, 2, 3, 4, and portions of Section 11, Article XV, Sections 1, 2, 3 and 4, and Article XVI, Section 1; House Bills 987 and 773, 3d Hawaii Legislature (1965); and Act 334 of the Session Laws of Hawaii, Regular Session of 1949. These provisions are set forth in Appendix A.

QUESTIONS PRESENTED

1. Whether the District Court erred in affirmatively upholding the constitutionality of the parts of Article III of the Hawaii Constitution which govern the apportionment of the House of Representatives and certain aspects of the apportionment of the Senate even though the court had held that the part of Article III fixing the number of Senators per Senatorial district was unconstitutional? [Part I.A., pp. 29-42]

---

[2] Judicial Code § 2101, Rule 58, and the *Hark* case support the proposition that these appeals were timely as to the February order since the time would, in any event, even if the order had not been suspended, be measured from the date of the order's entry, April 9. The other authorities teach that the suspension of the February order until April 28, 1965, makes the latter date the relevant date for appeal.

2. Whether the measure of "registered voters" is a valid basis under the Equal Protection Clause for the apportionment of seats in the Hawaii Legislature? [Parts I.B., II., pp. 42-70; 96-97]

3. Whether the present districting of the Hawaii House of Representatives into districts with varying numbers of Representatives violates the Equal Protection Clause by arbitrarily discriminating against persons in districts with a small number of Representatives and against minorities in districts with a large number of Representatives? [Part I.C., pp. 70-85]

4. Whether the District Court abused its discretion or committed errors of law in ruling that (a) the Hawaii Legislature could not adopt a provisional reapportionment plan; (b) the permanent reapportionment plan thereby required in the first instance had to be put into effect before the 1966 general elections; (c) the constitutional amendment effecting the permanent reapportionment had to be proposed by a constitutional convention, rather than by the Legislature; and (d) such constitutional convention was not required to be apportioned on the basis of population? [Part I.D., pp. 85-94]

5. Whether the District Court's injunction prohibiting the Legislature, on the fifty-eighth day of its regular sixty-day session in 1965, from enacting legislation essential for the normal operation of state and municipal offices in Hawaii and essential for the continuation of programs for the health and welfare of the people of Hawaii, until such time as reapportionment legislation had been passed, amounted, under the circumstances, to an abuse of discretion, and whether a similar injunction rendered under

similar circumstances at subsequent sessions, would likewise amount to an abuse of discretion? [Part I.D., pp. 95-96]

6. Whether the District Court correctly held that the provisional Senate reapportionment plan's arbitrary districting discriminated in favor of the representational power of people living within the largest multimember districts, and submerged the minorities within these districts, in violation of the Equal Protection Clause; and, whether, in any event, the District Court was justified in declining to approve that plan? [Part II., pp. 96-106]

STATEMENT

In these consolidated appeals, the Governor of Hawaii, as appellant in No. 318, is challenging certain portions of the orders of a special three-judge District Court for the District of Hawaii, convened pursuant to 28 U. S. C. §§ 2281 and 2284. The portions in question affirmatively declared "valid and constitutional" under the Federal Constitution the apportionment of the Hawaii House of Representatives and certain aspects of the apportionment of the Hawaii Senate. They also imposed certain procedural limitations on the legislative reapportionment in Hawaii—a reapportionment which was necessitated by the court's finding that the Hawaii Senate was unconstitutionally apportioned in respect of the number of Senators per Senatorial District, as all parties urged or conceded. In Nos. 323 and 409, the Governor, as appellee, is supporting the District Court's order rejecting a plan to reapportion the Hawaii Senate proposed to the District Court in April 1965 by the Hawaii Legislature. Pursuant to stipulation among the parties, this consolidated brief is submitted by the Governor as the opening brief in these three appeals.

A. Background

1. *The distribution of population and registered voters in the State of Hawaii.*—According to the 1960 federal census, the total population of Hawaii was 632,772 persons. (R. 54) The number of persons who were registered voters in 1958 was 175,317; in 1960 was 202,059; in 1962 was 221,650; and in 1964 was 239,285. (R. 54)

The State of Hawaii consists of a series of islands, many of which are separated by deep channels and broad expanses of water. The State is geographically divided into four basic areas, each consisting of a main island and, in some instances, small and usually uninhabited islands in close proximity to it. The four basic areas are Hawaii,[3] Maui, Oahu, and Kauai. Politically, each of these basic areas is a county; or, in the case of Oahu, a city and county—the City and County of Honolulu.[4] The distribution of population and registered voters among these areas is shown in the following table:

		Registered Voters			
Area	Population 1960	1958	1960	1962	1964
Hawaii	61,332	25,534	26,059	27,194	28,098
Maui	42,855	16,755	17,539	18,325	18,752
Oahu	500,409	121,647	147,123	164,324	180,169
Kauai	28,176	11,381	11,338	11,807	12,266
					(R. 55)

[3] Colloquially, the "Big Island." (R. 248) It is located about two hundred miles southeast of Oahu, the population center of the State.

[4] The county name for each of the basic areas, other than Oahu, is the same as the name of the main island in the basic area—Hawaii, Maui, and Kauai. In addition there is a fifth county, Kalawao, which is a Hansen's disease treatment area. This county is located on the island of Molokai, the remainder of which is part of Maui County. Kalawao County votes with Maui County for state legislators.

2. *The apportionment of the Hawaii Legislature under Article III of the Constitution of the State of Hawaii.* A constitutional convention, convened in 1950 by the Legislature of the then Territory of Hawaii, established the present scheme of legislative apportionment in Hawaii.

Article III, Section 1, of the Constitution provides that the legislative power of the State is vested in a bicameral Legislature, consisting of a Senate and of a House of Representatives, and extends "to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States."

The Senate.—Section 2 provides for a Senate of twenty-five members elected by the qualified voters of the Senatorial Districts. The geographical boundaries of the districts and the number of Senators to be elected from each are specified in the constitution. Six districts—all multi-member—were established. Hawaii and Oahu were each divided into two districts, while Kauai and Maui, with their neighboring islands, each constituted a single district.

The districts, the number of Senators to which they were entitled, and the population and registered voters of each are as follows:

Senatorial Districts	Population 1960	Registered Voters 1958	1960	1962	1964	Senators
First—Hawaii	44,297	19,031	19,266	20,053	20,739	5
Second—Hawaii	17,035	6,503	6,793	7,141	7,359	2
Third—Maui	42,855	16,755	17,539	18,325	18,752	5
Fourth—Oahu	182,307	62,398	73,981	80,490	87,209	5
Fifth—Oahu	318,102	59,249	73,142	83,834	92,960	5
Sixth—Kauai	28,176	11,381	11,338	11,807	12,266	3

(R. 55)

Under this Section, 21% of the 1960 population of the State (residents of the First, Second, Third, and Sixth

Senatorial districts) elects 60% of the Senate, while 79% of the population elects only 40% of the Senate. (R. 55) The deviations between (i) the average number of persons (or registered voters) per Senator in the State and (ii) the number of persons (or registered voters) per Senator in certain Senatorial Districts may be illustrated by the following table:

	Population per Senator 1960	Registered Voters per Senator — 1958	1960	1962	1964
Average in State per Senator (25 Senators)	25,311	7,012	8,082	8,866	9,571
2nd—Hawaii (2 Senators)	3,518 (lowest)	3,251 (lowest)	3,396 (lowest)	3,571 (lowest)	3,678 (lowest)
4th—Oahu (5 Senators)	36,461	12,479 (highest)	14,796 (highest)	16,098	17,442
5th—Oahu (5 Senators)	62,620 (highest)	11,850	14,628	16,767 (highest)	18,592 (highest) (R. 56)

The Hawaii Constitution specifies constitutional amendment as the only means by which this districting and apportionment scheme may be altered, and Article XV, Section 2, provides that:

> " . . . no constitutional amendment altering . . . the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties."

The House of Representatives.—Section 3 of Article III provides for a House of Representatives of fifty-one members elected by the qualified voters of eighteen Representative Districts. The boundaries of the Representative Districts and the number of Representatives initially appor-

tioned to each are specified in Article XVI of the Constitution. Each district had between one and six Representatives. The County of Hawaii was divided into five districts electing eight Representatives, Maui into two districts electing six Representatives, Oahu into ten districts electing thirty-three Representatives, and Kauai into one district electing four Representatives.

Pursuant to Section 4 of Article III, the Governor of Hawaii in 1959 reapportioned the fifty-one Representatives among the eighteen districts. Section 4 provides that in 1959, and in each tenth year thereafter (1969, 1979, etc.), the Governor shall reapportion the House according to the following procedure. First, the fifty-one Representatives are to be apportioned among the four basic areas of the State by applying the method of equal proportions to the number of voters registered during the most recent general election. No basic area, however, may receive less than one representative. Then, the number of Representatives allocated to each basic area is to be apportioned among the existing Representative Districts within that area. Again, the method of equal proportions is to be applied to the number of voters registered during the most recent general elections in each Representative District. If during this reapportionment the Governor discovers that an existing district contains less than half the number of registered voters which is the average number of registered voters per Representative in the State, he is to redistrict the basic area in question so that each district contains more than half of the average number.[5]

---

[5] This provision constitutes the only means of redistricting the House other than by constitutional amendment.

The allocation of Representatives among the existing districts arrived at by the Governor in 1959 by applying the method of equal proportions to the number of registered voters in the 1958 general election is as follows:

Representative Districts	Population 1960	Registered Voters 1958	1960	1962	1964	Representatives
First—Hawaii	5,030	2,209	2,257	2,319	2,399	1
Second—Hawaii	31,553	13,836	14,036	14,706	15,274	3
Third—Hawaii	7,714	2,986	2,973	3,028	3,066	1
Fourth—Hawaii	11,369	3,862	4,073	4,239	4,329	1
Fifth—Hawaii	5,666	2,641	2,720	2,902	3,030	1
Sixth—Maui	7,138	2,560	2,574	2,739	2,897	1
Seventh—Maui	35,717	14,195	14,965	15,586	15,855	4
Eighth—Oahu	68,281	13,876	18,309	22,450	27,073	4
Ninth—Oahu	42,816	5,929	7,410	7,973	8,934	2
Tenth—Oahu	95,118	12,926	17,009	20,861	23,859	4
Eleventh—Oahu	57,743	10,525	12,553	14,401	15,148	3
Twelfth—Oahu	25,552	8,372	10,000	10,889	11,500	3
Thirteenth—Oahu	28,592	7,621	7,807	7,260	6,446	2
Fourteenth—Oahu	42,476	14,134	16,056	17,305	18,571	4
Fifteenth—Oahu	60,125	21,063	25,869	28,685	31,302	6
Sixteenth—Oahu	42,750	13,746	16,176	17,072	18,201	4
Seventeenth—Oahu	36,956	13,455	15,880	17,428	19,135	4
Eighteenth—Kauai	28,176	11,381	11,338	11,807	12,266	3

(R. 55)

The average number of persons per Representative throughout the State is 12,407. The actual number of persons per Representative in the First District (Hawaii) is 5,030, while the actual number of persons per Representative in the Tenth District (Oahu) is 23,779. These figures, along with similar figures based upon registered voters demonstrating the extent of the deviations, are shown in the following table:

	Population per Representative 1960	Registered Voters per Representative			
		1958	1960	1962	1964
Average in State per Representative (51 Representatives)	12,407	3,437	3,962	4,346	4,691
1st—Hawaii (1 Representative)	5,030 (lowest)	2,209 (lowest)	2,257 (lowest)	2,319 (lowest)	2,399 (lowest)
8th—Oahu (4 Representatives)	17,070	3,469 (highest)	4,592 (highest)	5,610 (highest)	6,768 (highest)
10th—Oahu (4 Representatives)	23,779 (highest)	3,231	4,251	5,215	5,965

(R. 56)

If reapportionment were based on 1960 population rather than 1958 registered voters, the number of Representatives allocated to each basic area would be substantially different: the County of Hawaii five rather than seven; Maui four rather than five; Oahu 40 rather than 36; and Kauai two rather than three. (Plaintiffs' Ex. 1, R. 339)

B. The Present Proceedings

1. *The complaint and the parties.*—On August 13, 1964, shortly after this Court's reapportionment decisions of June 1964, this action was commenced by certain residents, taxpayers, and qualified voters of the City and County of Honolulu.[6] The complaint alleged that the sections of the

[6] The suit was brought against the Lieutenant Governor of Hawaii in his capacity as the state officer responsible for supervising state elections.

Hawaii Constitution relating to legislative apportionment violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The complaint alleged that (a) the Senate was apportioned on the basis of geography rather than of population, and accordingly Senatorial Districts containing 21% of the population elected 49% of the total number of Senators; (b) the House of Representatives was apportioned on the basis of registered voters rather than of population, with the result that plaintiffs' districts had fewer Representatives than if apportionment had been based on population; (c) the apportionment of the Senate and the House of Representatives of the Hawaii State Legislature was an integrated apportionment scheme for overall legislative representation and the apportionment of the House of Representatives was not severable from that of the Senate; and (d) the application of the apportionment provisions of the State Constitution resulted in a grossly unfair weighting of both houses of the Legislature in favor of the lesser populated areas of the State and therefore in an unconstitutional apportionment of both houses. (R. 1-13)

A declaratory judgment was sought that the Due Process and Equal Protection Clauses were violated by this scheme of legislative apportionment and that the Hawaii State Legislature had the power provisionally to apportion the Legislature by statute pending the adoption of a constitutional amendment.[7]

---

[7] Plaintiffs also requested that the Lieutenant Governor be enjoined from performing his election duties unless the Legislature passed a valid reapportionment plan to be used in the 1964 election, that he be ordered to conduct the 1964 election on an at-large basis, or that the court provide a constitutional apportionment plan for the conduct of the 1964 elections. The plaintiffs requested that, if these requests were denied, the court should re-

A three-judge court was convened and allowed the Governor, who joined substantially in the plaintiffs' allegations and prayer for relief, to intervene as a plaintiff.[8] (R. 37-41; 191) Various State Senators and Representatives also intervened as defendants. (R. 42-53; 191)

2. *The February order.*—The court denied preliminary injunctive relief and, after an evidentiary hearing, rendered a decision dated February 17, 1965, and entered April 9, 1965. That decision held that the provisions of Article III of the Hawaii Constitution fixing the number of Senators per Senatorial District were unconstitutional[9] but affirmatively ~~declaring~~ declared that the remainder of Article III, including the provisions relating to the apportionment of the House of Representatives, was constitutional. (R. 62-81) The District Court also invalidated the provisions of Article XV, Section 2, of the Hawaii Constitution, requiring a majority vote of the electorate of each of a majority of the counties to amend the Constitution's Senatorial apportionment scheme. (R. 66, 79; 238 F. Supp., at 471-72, 478)

The District Court held that Sections 3 and 4 of Article III, dealing with apportionment of the House of Repre-

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tain jurisdiction of the case to review proposed apportionment plans, and, if such were not forthcoming, to devise and effect an appropriate apportionment plan.

[8] The Governor is a citizen, taxpayer, and elector of the State of Hawaii and a qualified voter in Hawaii's Fifth Senatorial District and Eighth Representative District. (R. 38) Therefore, whether or not he has standing in his capacity as Governor and as a representative of the people of Hawaii, he may prosecute the appeal in No. 318. See *Baker* v. *Carr*, 369 U. S. 186, 204 n. 23 (1962).

[9] All parties had admitted that the Senate had been apportioned on the basis of geography rather than population and therefore that the Senate apportionment provisions violated the Equal Protection Clause. (R. 65; 238 F. Supp., at 471)

sentatives, were severable from Section 2, dealing with Senate apportionment because there was "no evidence . . . that the Constitutional Convention would have apportioned the house in any other way than it did" if it had known that the Senate's apportionment scheme was invalid. (R. 66; 238 F. Supp., at 472) Therefore, it held that the provisions relating to the House did not fall with the unconstitutionality of the provisions relating to the apportionment of Senators.

Turning to the validity of the apportionment in the House thus viewed apart from that of the Senate, the court upheld the "registered voters" measure of representation used in the House. The court looked to whether the "registered voters" measure, when adopted in 1950 and used for reapportionment in 1959, resulted in an apportionment substantially on the basis of population. (R. 68; 238 F. Supp., at 472-73) The court indicated that the Census Bureau's figures on total population were not an "accurate or reliable method of determining the true number of *residents* of a given area" of Hawaii (1) because of a large and fluctuating number of military personnel in the State, concentrated mainly on Oahu, (2) because of the large number of tourists initially tabulated by the Census Bureau in Hawaii, and (3) because census tract boundaries do not often coincide with precinct and district lines in Hawaii. (R. 70-75; 238 F. Supp., at 473-76) Moreover, the court held that the percentage of registered voters per eligible voters in the State as a whole was high, and that deviations were slight between the number of Representatives each basic area would receive on the basis of registered voters and on the basis of civilian population. (R. 73-74; 238 F. Supp., at 475-76)

The court held that the districting of the House was constitutional, thus approving the House use of multi-member districts. (R. 77, 79-80; 238 F. Supp., at 477, 478-79) It also held that the provision for reapportionment by the Governor in 1959 and every tenth year thereafter—*i.e.*, in the year preceding the federal census—was valid. (R. 77; 238 F. Supp., at 477) The court thereupon entered an affirmative decree that all the provisions of Article III, except those fixing the number of Senators per Senatorial District, were "constitutional and valid." (R. 79; 238 F. Supp., at 478)

The District Court denied the power of the Hawaii Legislature to enact provisional reapportionment legislation, holding that "any change in the representation from any senatorial district must be by constitutional amendment." (R. 78; 238 F. Supp., at 478) The court considered the two specified methods by which amendments to the Hawaii Constitution may be initiated[10] under Article XV of that Constitution: (1) by a constitutional convention proposed by the Legislature by statute and called by the electorate, or (2) by the Legislature by a two-thirds vote at one session, or by majority votes in each of two successive sessions. Because the Legislature had not initiated an amendment during its 1964 special reapportionment session and because it appeared therefore unlikely to the court that any legislatively-initiated measure would be adopted before the 1966 elections, the court held that a convention must be convened. It accordingly enjoined the Legislature from taking final action on any legislation, except that necessary to hold the 1965 session, until the Legislature passed a statute pro-

[10] After initiation, final approval of the amendments must come from the electorate. Hawaii Const., Art. XV, §§ 2, 3.

posing a convention to the electorate.[11] (R. 78; 238 F. Supp., at 478) Jurisdiction was retained for all purposes, including that of judicially reapportioning the Senate in the event of failure of adoption of an appropriate amendment in time for the 1966 elections. (R. 81; 238 F. Supp., at 479)

3. *The Legislature's Senate Plan.*—On March 9, 1965, on the motion of intervening defendant legislators, the court amended its order of February 17, 1965, to allow the Legislature to enact a provisional reapportionment plan and to propose a constitutional amendment by legislation instead of by constitutional convention. Under the amended order, the legislators were enjoined from taking final action on any legislation until the Legislature had (1) enacted a reapportionment and redistricting plan for the Senate, on the basis of 1964 registered voters, to be applicable to the 1966 elections, (2) adopted a proposed constitutional amendment embodying pertinent provisions of the provisional plan, to be presented to the electorate for ratification at the 1966 general election,[12] and (3) provided for submission to the electorate at the 1966 general election the question: "Shall there be a convention to propose a revision of or amendments to the Constitution?" (R. 88-91) These measures were to be enacted by the Legislature and submitted to the court for approval.

Pursuant to this order, the Hawaii Legislature at first considered an abortive effort to reapportion the Senate by

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[11] As will be developed below, it is not clear whether the injunction has any application other than to the 1965 regular session of the Third Legislature. See pp. 95-96, *infra*.

[12] It should be noted that the court thus affirmatively required that the basis for apportionment be 1964 registered voters, both as to the provisional and as to the permanent plan.

keeping the existing six Senatorial Districts and dividing the 25 Senators among them on a "registered voters" basis. Thus the two Oahu districts were assigned, respectively, ten and nine of the 25 Senators. The District Court informally indicated disapproval of the proposal, which was not enacted or further heard from. (App. B., pp. 28a-29a, *infra*)

After further consideration, in April the Legislature enacted two bills reapportioning the Senate.[13] House Bill No. 987 provided for a provisional reapportionment of the Senate (R. 113-17); House Bill No. 773 consisted of a proposal to the electorate, in substantially the same terms, to amend the provisions of the Hawaii Constitution relating to Senate apportionment.[14] (R. 140-45)

The plan continued the number of Senators at twenty-five[15] and specified the boundaries of the Senatorial Districts and the number of Senators from each district. Each "basic area" was guaranteed at least one Senator. The previous division of the County of Hawaii into two Senatorial Districts was abandoned in favor of a single district electing three Senators. Oahu, which had previously been divided into two Senatorial Districts electing five Senators each, was now divided into five new Senatorial Districts, four of which were to elect four Senators each and the fifth to elect three Senators. These districts largely were the same as the existing Representative Districts.

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[13] H.B. No. 773, S.D. 1, C.D. 1, 3d Legis. (1965); H.B. No. 987, S.D. 1, C.D. 1, 3d Legis. (1965).

[14] Responsive to the final element of the Court's March order, House Bill No. 986 submitted the question concerning the convening of a constitutional convention to the electorate. (R. 147)

[15] The provision of Article III fixing the number of Senators at twenty-five had been affirmatively declared constitutional and valid by the court in its February order. See p. 15, *supra;* p. 29, *infra.*

The measure of the apportionment was the number of 1964 registered voters. Under this method, the following apportionment was provided:

Senatorial Districts		Number of Senators	1964 Registered Voters
Hawaii	First	3	28,130
Maui	Second	2	18,786
Oahu	Third	3	27,073
	Fourth	4	35,780
	Fifth	4	39,361
	Sixth	4	40,629
	Seventh	4	37,336
Kauai	Eighth	1	12,266
		25	239,361

(R. 411)

Under the Legislature's plan, the average number of registered voters per Senator would have been 9,574. The most underrepresented district would have been the Eighth (Kauai), with 12,266 registered voters per Senator. The most overrepresented district would have been the Fourth, on Oahu, with 8,945 registered voters per Senator.

The Legislature's plan further provided that the Governor of Hawaii should reapportion the Senate, in 1975 and every tenth year thereafter, using the method described in Article III of the Constitution for reapportionment of the House of Representatives.[16]

4. *The District Court's decision holding the Legislature's Senate plan invalid.*—These bills were submitted for District Court review by the intervenor-defendants on April 14, 1965. On April 19, 1965, the court stayed its injunction

[16] See p. 9, *supra*.

against the enactment of legislation, pending its ruling on the bills. (R. 150) On April 28, 1965, the court issued a decision disapproving the provisional plan for reapportionment of the Senate, reinstating the injunction against enactment of legislation, and holding that a constitutional convention must be called to initiate a reapportionment plan. (R. 151-65)

Earlier in April the District Court had informally expressed its opinion to the parties concerning the validity of multimember Senatorial Districts. The court had said:

> "We believe that the Senate should be redistricted into single senatorial districts, although we may approve two-member districts if and only if the legislature can affirmatively show substantial reasons therefor. There may very well be valid reasons for one or two 2-member districts in the neighboring islands but we perceive no justification whatsoever for other than single member districts on the Island of Oahu, particularly the heavily populated areas thereof." (App. B., p. 28a, *infra*)

In its April 28, 1965, opinion the District Court acknowledged that the provisional Senate apportionment conformed to the standards of the method of equal proportions.[17] (R. 155; 240 F. Supp., at 727) Despite this, the court found that the plan did not afford equality of representation. The court found that the criteria considered in redistricting were compactness, contiguity, number of 1964 registered voters, geographical boundaries, and historical Representative District boundaries.[18] Because of the Legis-

[17] Using, of course, a "registered voters" measure.

[18] "Apparently, ethnic, political, industrial, economic, social, occupational factors, and community of interests and problems

lature's reliance on existing Representative District lines, the court analyzed the Representative Districts. The court found that at least one district was clearly too large, the Fifteenth on Oahu with six Representatives, and that a number of others contained socially, economically, and geographically disparate groups. (R. 157-58; 240 F. Supp., at 728-29)

Emphasizing that apportionment of one house of a bicameral legislature must complement the other in order to cancel the inequities necessarily inherent in most single-house apportionments, the court held not only that the proposed plan failed to complement the existing House of Representatives apportionment, but also that the congruity of certain multimember Senate District boundaries with boundaries of the multimember Representative Districts intensified inequality of voting power. (R. 159-63; 240 F. Supp., at 729-31) For instance, the Third Senatorial District was coterminous with the Eighth Representative District, resulting in seven legislators who would represent the same constituency. Therefore, the political power of residents of these districts would be disproportionately high as compared with that of residents of other districts. Moreover, the minorities within such a district would be effectively submerged as to both House and Senate representation. No sufficient justification for this inequality of representation or for the boundary construction of the districts was found.

The court also found that multimember districts were used for purposes of gerrymandering to protect incumbent Senators. (R. 163; 240 F. Supp., at 732) Therefore, the

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were given little if any consideration by the legislature." (R. 156; 240 F. Supp., at 728)

plan was disapproved, and the injunction against final legislative action was reinstated—on the fifty-eighth day of a sixty-day legislative session.

5. *The appeals to this Court.*—In May, 1965, the Governor filed his notice of appeal to this Court, (R. 165) and certain intervenor-defendant Representatives, appellants in No. 323, and certain intervenor-defendant Senators, appellants in No. 409, filed their notices of appeal. (R. 180, 184)

On May 7, 1965, the Governor filed a motion in the District Court to suspend the injunction against the legislators and to stay the order of April 28, 1965, pending determination of his appeal to this Court. (R. 168) The District Court denied this motion on May 11, 1965. (R. 188) On May 13, 1965, the Governor applied to Mr. Justice Douglas for a stay of the injunction against enactment of legislation. By order dated May 21, 1965, Mr. Justice Douglas granted the stay.

On October 11, 1965, this Court noted probable jurisdiction in Nos. 318, 323, and 409 and consolidated these appeals. (R. 412)

SUMMARY OF ARGUMENT

I. The District Court erred in a number of important respects in the orders under review. Its fundamental error was in affirmatively holding valid the remaining terms of the Hawaii Constitution's legislative apportionment provisions, despite the fact that it struck down material provisions of the Senate apportionment. Apart from this, the court erred in sanctioning the "registered voters" measure of apportionment and the multimember districting employed in the House of Representatives. It also erred in certain matters going to remedies.

A. 1. The District Court undertook, after holding the Hawaii constitutional provisions fixing the number of Senators per Senatorial District invalid, to hold the remaining provisions dealing with legislative apportionment "constitutional and valid." It thus upheld, among other things, the apportionment of the House. This holding was a flat contradiction of the teachings of this Court in *Maryland Committee* v. *Tawes*, 377 U. S. 656, 673 (1964). A court must consider the validity of a bicameral system as a whole and the remainder of the system cannot be declared valid if any material part of it is invalid.

2. Moreover, the apportionment of the Hawaii House and the Hawaii Senate are interdependent as a matter of fact. The use of the bicameral system, the details of the provisions of the Legislative Article, and its legislative history all confirm this. And this interrelationship extends to other provisions of the legislative apportionment scheme, such as the details of the measure of representation and the number of legislators.

3. The District Court's error in affirmatively upholding the terms of the legislative apportionment provisions, apart from the provisions fixing the number of Senators per Senatorial District, has already embarrassed the course of orderly reapportionment in Hawaii. It was responsible for the patently invalid Senate plans formulated by the Legislature in March and April 1965. It has the effect as a legal matter of preventing the Legislature—or the court itself while its ruling stands—from adopting an appropriate, comprehensive, bicameral reapportionment scheme. Moreover, as a practical matter it will tend to foreclose reexamination of the apportionment of the House in the framing of a permanent plan through constitutional amend-

ment, and thereby destroy the essential flexibility which should exist in any consideration of reapportionment.

B. The District Court erred in declining to hold unconstitutional the "registered voters" measure of apportionment employed in the Hawaii House of Representatives. The use of that measure is not permissible in itself; in Hawaii it does not as a matter of fact produce an apportionment substantially equivalent to that which would be the case under a permissible method; and it cannot be affirmatively upheld on a continuing basis, as is the effect of the District Court's order.

1. This Court's decisions teach that the equality of representation which the Equal Protection Clause demands is to be measured on a population basis. This is in accord with the settled practice in the federal House of Representatives and in the overwhelming majority of state legislatures. The key to the matter is equality of representation. There are many people who do not or who cannot vote, but they and their needs are nonetheless entitled to representation. Indeed, it does not appear that in Hawaii the "registered voters" measure was chosen on some supposition that the only basis of equality was that between voters; rather it was adopted under the conception that it furnished a usable benchmark of population.

2. But, in fact, the "registered voters" measure in Hawaii does not produce an apportionment substantially equivalent to that which a population measure would produce. The statistical proofs amply demonstrate this. Ten of the eighteen Representative Districts would have a different number of Representatives under a population measure from the number under a "registered voters" measure. More-

over, the "registered voters" measure discriminates against certain groups: against persons living in areas of low proportions of registration; against areas which have in the past received less representation than that to which they were entitled; against the poor and the areas in which they live; against the illiterate and the areas in which they live; against areas with a low median population age; against the military and the areas in which they live.—Indeed, the District Court appeared to uphold the "registered voters" measure in substantial part because it did exclude the military. However, the "registered voters" measure in Hawaii does not in fact even provide representation on a basis substantially equal to that of a "civilian population" measure. And, in any event, it is not constitutionally permissible to exclude military personnel as such from the representation measure.

3. The Hawaii constitutional provision in question does not simply set forth a system of apportionment which happens to have been based on a "registered voters" measure; it enshrines the "registered voters" measure in terms in the State Constitution, by requiring it to be used as the measure for periodic House reapportionment by the Governor. The District Court's affirmative declaration that this provision was constitutional would thus have been erroneous even if at the present time the "registered voters" measure happened to produce a result substantially equivalent to a population measure.

C. The District Court erred in sanctioning the multimember districting scheme used in the House of Representatives. While multimember districting schemes do not *per se* violate the Equal Protection Clause, *Fortson* v.

Dorsey, 379 U. S. 433 (1964), they must be scrutinized with particular care.

1. Here the keystone of the essential invalidity of the scheme is the complete arbitrariness of the construction of the Representative Districts, both in terms of boundaries and in terms of size. There is no rational pattern here justifying the existence of districts of varying sizes which in turn call for varying numbers of Representatives. And there was no reason for the complete arbitrariness of the multimember districting scheme; it was possible to draw single-member districts and to draw them on a basis in which—unlike the multimember districts—population figures from the federal census could be meaningfully used. This arbitrariness cannot be sustained in view of the severe consequences which it has for fair and equal representation.

2. The Hawaii multimember districting system results in overrepresenting the large multimember districts. A person in these districts has a number of Representatives responsive to him, whereas a person in a single-member district has but one. This, as a practical matter, is not counterbalanced by the numerically proportional increase in the size of the constituencies.

3. Moreover, the use of the multimember districting system in as diverse a society as Hawaii tends to submerge minority groups within the large multimember districts. In the light of the affirmative findings of the District Court as to the diversity of the population and the presence of minorities in the larger multimember districts, and of the absence of any rational basis for drawing those districts, the District Court should not have sanctioned the multimember districting system in the House.

D. The District Court erred in several respects concerning remedies. 1. It foreclosed, apparently as a matter of law, the possibility of provisional reapportionment by legislative action. This conflicts with the decision of this Court in *Maryland Committee* v. *Tawes, supra;* was apparently based on a misreading of a Hawaii Supreme Court decision; and is at the base of most of the court's other errors as to remedies. 2. The District Court also erred in ordering that a permanent reapportionment plan be put into effect before the 1966 general elections. In view of the possibility of a provisional plan, this stringent time table was not necessary for a permanent plan. 3. The District Court also improperly required that any permanent reapportionment amendment be initiated by constitutional convention rather than by the Legislature. There is no basis for the court's foreclosure of one of the two alternative methods provided in the Hawaii Constitution for proposal of constitutional amendments. 4. In any event, the District Court erred in not affirmatively requiring a proper apportionment at any such constitutional convention. 5. Finally, the District Court abused its discretion in imposing an injunction against legislation on the fifty-eighth day of a sixty-day legislative session, as a remedial device to bring about reapportionment.—While the effects of this action have been cancelled by the stay order issued out of this Court, it is unclear what the status of the injunction against legislation will be on remand, and this Court should make it clear that it would be an abuse of discretion to impose it under circumstances similar to those under which it was imposed in the 1965 session.

II. The District Court was correct in declining to approve the Legislature's proposed reapportionment plan for the Senate. In the first place, its action should be affirmed

on the alternative ground that the provisional Senate plan used the impermissible "registered voters" measure of representation. Moreover, the District Court was correct on the grounds on which it did act.

A. The provisional Senate plan's arbitrary construction of multimember districts violated the Equal Protection Clause. Indeed, the District Court found that the purpose of the construction of the Senate Districts was to protect the tenure of incumbent Senators—the same incumbent Senators who had voted for the measure. The court found no rational basis for the construction of the districts other than the use of the boundaries of the Representative Districts, which were completely arbitrary in themselves.

The effect of this arbitrary districting was clearly, as the District Court found, to submerge minorities within the large multimember districts and to give the majorities in those districts inordinate representational power vis-a-vis the rest of the State. Moreover, as the District Court also rightly found, the effect of the Senate plan was to intensify the inequities inherent in the House multimember districting plan. The cumulative effect of these inequalities, compounded by the arbitrariness of the districting, violated the Equal Protection Clause and the District Court was accordingly justified in rejecting the plan.

B. Even if these inequities in the Senate plan were thought not to amount to a violation of the Equal Protection Clause, the District Court's refusal to approve the Senate plan should nonetheless be sustained. Only the provisional plan was before the court. As permitted by its broad discretion to frame a remedy for the conceded malapportionment of the Senate, the District Court's order provided that any provisional plan adopted by the Legislature be

subject to its approval; and indeed the legislation enacting the provisional plan stated expressly that it was subject to the District Court's approval. Certainly in considering whether to approve or disapprove a provisional reapportionment plan, the District Court had a duty to scrutinize the plan to make sure that it negated the effects of the prior malapportionment and offered a sound basis on which a permanent reapportionment amendment might be adopted. Clearly, the infirmities found by the District Court, even if they are deemed not to be constitutionally dispositive, were sufficient to disqualify the provisional plan on this basis.

ARGUMENT

I. THE ERRORS OF THE DISTRICT COURT

In this part, we brief the Governor's appeal in No. 318 in which he contends that the District Court erred in a number of important respects in the orders under review.

Fundamentally, the District Court erred in affirmatively holding valid the remainder of the Hawaii Constitution's provisions for legislative apportionment, despite the fact that it had struck down the material provisions of the Senate apportionment. Even apart from this, however, certain features of the House apportionment—the extensive multimember districting and the use of registered voters as a measure of representation—were invalid, and the District Court's holdings to the contrary were erroneous. —Naturally, these two features—the use of multimember districts and the "registered voters" measure—may well recur in any future proposal to reapportion the Senate, underscoring the importance of a decision on them.

The District Court also erred in several matters going to remedies. It erroneously precluded interim provisional reapportionment by the Legislature, and improperly foreclosed one of the methods provided in the Hawaii Constitution for the initiation of constitutional amendments. Finally, if its injunction against legislation until a reapportionment plan is provided for has a continuing effect, it is too extreme a measure.

We will brief these points in turn in this Part I, before turning to the defense of the court's rejection of the April 1965 Senate reapportionment plan in Part II.

A. The District Court Erred in Affirmatively Holding That, Despite the Unconstitutional Provisions of Article III of the Hawaii Constitution Fixing the Number of Senators Per District, All Other Provisions of Article III Were "Constitutional and Valid."

In its opinion of February 17, 1965, the District Court undertook affirmatively to hold that, despite the unconstitutional provision of Article III, Section 2, fixing the number of Senators per Senatorial District, the other provisions of Article III were "constitutional and valid." (R. 79-80; 238 F. Supp., at 478-79) The court thus affirmatively held valid the provisions for apportionment of the House. Moreover, the court affirmatively upheld even the provisions of Section 2—relating to the Senate—which dealt with matters other than the apportionment of the number of Senators per Senatorial District. (R. 66-67 n. 4, 79; 238 F. Supp., at 472 n. 4, 478) Thus, it impliedly held constitutional the present Senatorial districting boundaries; and, indeed, it expressly upheld the provision fixing the membership of the Senate at twenty-five. In so doing the court erred.

1. The District Court affirmatively held that most of the provisions for legislative apportionment in Hawaii are "constitutional and valid" despite the unconstitutionality of the provision fixing the number of Senators per Senate District.—However, the issue before the court was whether the plaintiffs were denied the equal protection of the laws by being deprived of equal legislative representation. Necessarily, equality of representation depends on one's representation in the State's scheme of representation as a whole. As this Court stated in *Maryland Committee* v. *Tawes,* 377 U. S. 656, 673 (1964):

> ". . . in reviewing a state legislative apportionment case this Court must of necessity consider the challenged scheme as a whole in determining whether the particular State's apportionment plan, in its entirety, meets federal constitutional requisites. It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house. Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral state legislature."

In this case, however, the District Court first examined the Senate and found that it was unconstitutionally apportioned. It then evaluated the apportionment of the House of Representatives in a vacuum—without knowing what sort of Senate it would ultimately be coupled with—and affirmatively held the House apportionment to be constitutional.

This affirmative holding violated the dictate of this Court's opinion, just quoted, in the *Tawes* case. The District Court failed to realize the issue before it—the validity of an overall scheme of representation; it bifurcated the scheme, and treated the Hawaii Legislature as though it were the separate unicameral systems of two different states. Because the question before a court in a case challenging legislative apportionment is the validity of a system of representation, the invalidity of apportionment in one house invalidates the provisions concerning the second house. In the *Tawes* case, this Court said, "whether or not the House is apportioned on a population basis, the scheme of legislative representation in Maryland cannot be sustained under the Equal Protection Clause of the Federal Constitution, because of the gross disparities from population-based representation in the apportionment of seats in the Maryland senate." (377 U. S., at 673)[1] Therefore, not only must a court consider the validity of a bicameral system as a whole, but the remainder of the system cannot be declared valid if one material part of it is invalid.

The District Court's holding was based on its conclusion that there was no evidence that the provisions concerning the apportionment of the House of Representatives were inseverable *in fact* from those concerning the number of

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[1] To the same effect is *Lucas* v. *Forty-Fourth General Assembly*, 377 U. S. 713, 734-35 (1964). The lower court had assumed—and the parties had apparently agreed—that the apportionment of the Colorado House as set forth in a proposed apportionment plan was valid on the basis of population; this Court, finding the proposal for the Senate invalid, struck down the entire plan. Similar findings of inseverability were made by the district court, *Lucas* v. *Forty-Fourth General Assembly*, 232 F. Supp. 797, 799 (D. Colo. 1964), and recently by the Supreme Court of Colorado. *In re House of Representatives*, 400 P. 2d 931 (1965).

See also *Davis* v. *Synhorst*, 225 F. Supp. 689 (S. D. Iowa 1964), *aff'd sub nom. Hill* v. *Davis*, 378 U. S. 565 (1964).

Senators to be allocated to each district. This approach was erroneous as a matter of law; and the conclusion the court drew was erroneous as a matter of fact, as we will develop.

2. The provisions of Article III for the apportionment of the Senate and of the House are interdependent as a matter of fact. The interrelationship of the provisions of Article III is obvious from the face of the Article and from its legislative history.

(a) Indeed, the adoption of the bicameral form itself indicates this interdependence. Traditionally, the bicameral form has been used to create a set of checks and balances within the legislative branch of the government. "A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures." *Reynolds* v. *Sims,* 377 U. S. 533, 576 (1964). In order to attain these ends, the two houses have usually been structured differently—in number of members, number of constituents per member, and composition and geographical distribution of districts—in order to assure the full expression and representation of the views of the people. The structure of one is thus tied to the structure of the other.

It would be extravagant to assume that either house of a bicameral legislature was intended to stand without the other. A recent state case puts this matter clearly. In *Jackman* v. *Bodine,* 43 N. J. 453, 205 A. 2d 713 (1964), the Supreme Court of New Jersey, finding that the Senate apportionment provisions of the State Constitution were on their face unconstitutional, thereupon concluded that the court need not consider the validity of the lower house. "The reason is that a court cannot fairly assume the

people would have intended the one house to survive as the lone repository of the legislative power." 43 N. J., at 461; 205 A. 2d, at 717.[2]—But obviously, unless it is able to make that assumption, a court cannot affirmatively sanction the constitutionality of one legislative chamber's apportionment after declaring the other's unconstitutional.

(b) The detailed provisions and their history confirm this interrelationship between the structures of the chambers of the Hawaii Legislature. Sections 2, 3 and 4 of Article III deal with the structure of the two houses. From a cursory reading of those sections it is obvious that the Hawaii House and Senate differ in size, the Senate being approximately one-half the size of the House;[3] that the Senate has fixed districts from which a fixed number of Senators is elected, while the House has districts which may be altered in certain circumstances and from which differing numbers of members are elected according to the number of registered voters within them as established every ten years;[4] and that the Senate districts are generally much larger in geographical area than the House districts. Only the Sixth Senatorial District and the Eighteenth Representative District (Kauai) are the same in all respects. It is reasonable to presume from this system that each chamber was intended to reflect different views and to complement the other. The District Court found that the Senate was intended to represent predominantly rural views while the House was to

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[2] Similar results were reached in *Davis* v. *Cameron*, 238 F. Supp. 462, 465 (S. D. Iowa 1965); and *Stout* v. *Bottorff*, Civil No. IP-61-C-236, U. S. D. C., D. Ind., February 27, 1965.

See generally *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 241 (1929).

[3] The House has 51 members, the Senate 25. Article III, §§ 2, 3.

[4] Art. III, §§ 2, 4.

represent the urban views of the City and County of Honolulu. (R. 64-66; 238 F. Supp., at 471)

The Constitutional Convention of Hawaii considered that the apportionment of one house was the inducement and compensation for the apportionment of the other—a Senate based on geographical representation, giving a controlling majority to the counties of Hawaii, Maui and Kauai; and a House of Representatives based on registered voters, giving a controlling majority to the City and County of Honolulu. As stated by Delegate Cable A. Wirtz, a member of the constitutional convention, in the course of the convention debates:

> "The consensus, as I gather, of this Convention and of the Legislative Committee is that we should have two bases of representation in a bicameral legislature, one of the houses to be on the basis of population as indicated by means of registered votes; the other to be on the basis of a combination of geographical and political subdivisions, more or less patterned after our present existing Senate, keeping insofar as possible the same ratio and proportion. Now the idea of having the two bases of reapportionment is to provide a truly bicameral legislature with balances and checks. The Senate is designed so that no county, no one county or no one senatorial district has control over that house; whereas, based upon population, obviously, in the House of Representatives the control will be at present in the County of Oahu." (Governor's Ex. GO-2, R. 408)

This interrelationship is also indicated in the report of the convention's Committee on Legislative Powers and Functions:

> "[Y]our committee has agreed that the house of representatives must be apportioned on the basis of the number of registered voters among the several major island divisions (the present counties) but that the present ratio of representation among the four existing senatorial districts should be maintained in the senate." (Plaintiffs' Ex. 11, R. 343-44)

When the District Court rightly held that the Senate half of that "package" could not be squared with the Federal Constitution, it should have invalidated the whole apportionment package.

(c) There are also structural similarities between the systems for the two chambers which illustrate their interdependence. For example, the districting of the House depends on the districting of the Senate. The "basic areas" of the State—Hawaii, Maui, Oahu, and Kauai—are significant in the districting and apportionment of each house. No district crosses the boundaries of these basic areas. Each basic area is composed of one or two Senatorial Districts. The District Court found that the Senators are apportioned among the "basic areas" on the basis of geography. The members of the House are initially apportioned among these basic areas according to their registered voters and then distributed among the districts of each area.

Moreover, no Representative District is divided between two or more Senate Districts. Each Senatorial District is composed of one to four complete Representative Districts. Thus, the boundaries of all Senate Districts also constitute boundaries of Representative Districts, confirming that the districting of each house depends upon that of the other.

The interdependence of the boundaries is underscored by the provision of Section 4 that, while the Governor may reapportion the House, he may do so only by reallocating the number of representatives and not by redrawing district lines, except in one limited circumstance. The purpose of the constitutional draftsmen in creating a scheme in which the districting of one house was substantially dependent on that of the other was undoubtedly in large part to insure that the Senate Districts would be larger geographically and in number of constituents than the House Districts.

Also, both houses rely predominantly on multimember rather than single-member districts. All of the Senate Districts elect from two to five members. In the House, as originally apportioned and as reapportioned in 1959, thirteen of the eighteen districts elect more than one Representative.

(d) The interrelationship of the provisions of Article III is not confined to the relationship of the apportionment schemes of the two houses, but extends to many other material provisions of the Article. Two striking examples can be given.

In the first place, the provision of Article III that the Senate be composed of twenty-five members—which the District Court affirmatively sanctioned—is interrelated with the invalid geographical basis of apportionment in the Senate. The legislative history makes it plain that a Senate of this size was arrived at by extrapolating from the number of Senators to be allowed Oahu. (R. 346) But if that extrapolation had been done on a population basis, the size of the Senate would have been much smaller.—As we will develop below (pp. 39-40; 98-104), much of the difficulty later found in devising an appropriate plan for the Senate

arose from the freezing of the Senate at twenty-five members in effect ordered by the Court.

Secondly, the measure of representation is a material, inseverable element of the overall scheme. By affirmatively sanctioning the House apportionment scheme—with its use of registered voters as a representation measure, and its scheme of decennial reapportionment the year *before* the federal census, which prevents the effective use of any other representation measure—the Court committed the Senate reapportionment to the same measure. The use of two separate measures, one for each chamber, would be highly unlikely. As we shall develop below, pp. 42-70, there are independent reasons why this approach is impermissible in either house. However, even if it were a matter of discretion, there was no reason for freezing the choice of measures to be followed in the Senate.—But the court's action in affirmatively sanctioning the House apportionment and measure did just that.[5]

3. The District Court's error in departing from *Tawes* and affirmatively upholding the remaining provisions of Article III has more than academic consequences. It already has grossly embarrassed orderly reapportionment in Hawaii. It may be expected to do so further unless corrected.

(a) The ineffectual efforts at Senate apportionment essayed by the Hawaii Legislature in March and April 1965 are the primary object lesson. Section 1 of Article III expressly provides for a bicameral legislature. The geo-

[5] Indeed, the court's March order permitting the Legislature to propose a plan for the reapportionment of the Senate affirmatively mandated that the reapportionment be made on the basis of registered voters. (R. 89) This action appears to compound the errors committed by the District Court in freezing the alternatives that were before the Legislature.

graphically-structured, rural-oriented Senate envisioned by Article III to complement Article III's House of Representatives had been held unconstitutional. However, the House plan had been affirmatively upheld. Because the House plan was a valid part of the Hawaii Constitution, it could be amended only according to the provisions of Article XV of the Constitution relating to constitutional amendment.[6] Therefore, the Legislature, which was given the occasion in March 1965 by the court to propose a new Senate plan, was precluded from altering the apportionment of the House[7] and yet was required to create a rational

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[6] As we shall develop, the District Court on other occasions erroneously held that even the invalid provisions of Article III could be changed only by constitutional amendment. Its March orders, looking toward reapportionment of the Senate by legislation, correctly but inconsistently held otherwise.

[7] The following questions to and answers by the Chairman of the Conference Committee which approved the proposed Senate plan are of interest:

"Judge Pence: Were there any suggestions that perhaps the proposed constitutional amendment should provide for a complete redistricting of the House to make the House single member district [*sic*]? Was that ever discussed?

"The Witness: That was never discussed." (R. 297)

"Judge Jertberg: To what extent is the thinking, at least of the Senate Conferees, influenced by the fact that there were multiple representatives in the lower House?

"The Witness: I can't answer that, your Honor, because that problem was never discussed." (R. 298)

"Q. And you mentioned in your direct testimony, Senator, —and is it correct?—that the conferees did not consider the composition or possibility of a constitutional amendment to reapportion and to redistrict the House of Representatives at the same time as that of the Senate?

"A. No, because the conferees were not given the task of dividing [*sic*] the particular question." (R. 310)

"Judge Beeks: Was it discussed at all, Senator, in connection with your approval of this bill, if the House of Representatives should be redistricted?

"The Witness: If there was any discussion, I think the feeling was that the House districting plan would be left alone. The Court found it valid and has [that was?] the extent in the report in which it was discussed." (R. 310-11)

bicameral system of representation. Because of the interdependence of the provisions of Article III, illustrated above, this narrowing of the area within which any reapportionment plan could operate necessarily made the Legislature's task almost impossible, as the results amply proved. —Indeed. the Senate plan led one member of the court below to declare of the February decision sanctioning the House apportionment: "I am beginning to have great doubts as to whether we were right in the first place." (R. 311)

We will argue in subpart C below that the use of multimember districts in the House is unconstitutional in itself, and in part II below, that the proposal for the use of multimember districts in the Senate was properly held to be unconstitutional. But considerations of constitutionality aside, the effect of the error of the District Court in affirmatively sanctioning the remainder of Article III is plain: it produced the obviously undesirable Senate plans of March and April 1965 with their multimember districting run riot.

The multimember districting of the Senate was originally necessitated by the small number of Senate Districts created—six; and by the large number of members of the Senate—twenty-five. The District Court's February order impliedly held constitutional the provisions as to districts by holding that the provisions of Article III, Section 2, which did not relate to fixing the number of Senators per district were constitutional. (R. 79; 238 F. Supp., at 478) And the District Court then expressly held that the provision for twenty-five Senators was constitutional. (R. 66-67 n. 4; 238 F. Supp., at 472 n. 4)

When the Legislature in March initially attempted to reapportion the Senate, it merely reallocated the twenty-

five Senators among the existing six districts. This resulted in the allocation of nine Senators to the Fourth District in Oahu and ten to the Fifth District—the remainder of Oahu. Thus, seventy-six per cent of the Senators were to come from two enormous multimember districts in Oahu. This plan was abandoned after the District Court informally advised the parties that such lopsided districting would be unacceptable. The plan eventually submitted to the court in April provided for some redistricting of the Senate districts on Oahu, but it preserved the approach of having twenty-five Senators, as upheld by the court. The result was five Oahu Senatorial Districts with an average of 3.8 senators each. This is a vivid illustration of the dangers of presuming that the various details of the original apportionment plan even for a single house—here the Senate—are severable.

Moreover, the District Court's refusal to hold that the House plan was inseverable from the Senate also had an obvious, material effect on the multimember districting of the Senate set forth in the April plan. The District Court upheld the present boundaries of, and number of Representatives from, the House Districts. The House Districts were, in general, multimember. (See p. 10, *supra*) The Legislature, in reapportioning the Senate, understandably wished to create Senate Districts that were larger than House Districts. (R. 123-24; 134-35; 296-97) Any other approach would have made dubious the value of bicameralism. In order to do so on the basis of "equal proportions," as required by the court, and at the same time retain the present number of Senators, the inevitable result was the large, multimember districts, particularly on Oahu.[8]

[8] Indeed, the District Court's April opinion shows its first realization of the consequences of what it had done in affirmatively

(b) The court's action, then, has the positive legal effect of making it impossible for the Legislature provisionally to reapportion both houses by statute—and thus, practically, of making it impossible to reach a rational bicameral system. It will have the same effect on any attempt to reapportion judicially.—Moreover, it will, as a practical matter, embarrass any attempt at permanent reapportionment through constitutional amendment. The practical effect of an affirmative declaration of constitutionality must inevitably be to remove from reconsideration the apportionment of the chamber whose organization is affirmatively upheld.[9]

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sanctioning the constitutionality of the apportionment in the House. In rejecting the provisional Senate plan, the court pointedly observed:

> "In reapportioning and redistricting the senate, both houses overlooked the fact that, to be valid, the makeup of the senate must positively complement the makeup of the house, to provide the vital equality of voter representation. Both houses of the legislature seemingly forgot that the schemes of districting *each* house, when conjoined, must offer compensating advantages to the voters—not only to those voters within each representative district, be it senate or house, but to all voters throughout the State." (R. 159; 240 F. Supp., at 729)

Obviously, the proper course for the court to have followed, instead of regretting what the Legislature had done after the fact, would have been to have followed this Court's teaching in *Tawes* in the first place, and to have refrained from sanctioning the validity of any part of the overall scheme of legislative apportionment.

[9] To be sure, the court's order states that any constitutional convention "may also wish to reconsider the question" of the use of registered voters as a representation measure, the use of multi-member versus single-member districts, the practice of reapportionment immediately before the federal census—instead of the more appropriate time (if population is the guide) of immediately thereafter, and the alteration of the boundaries of the various legislative districts so that census data could be meaningfully used. (R. 78-79; 238 F. Supp., at 478) What value a simple exhortation of this nature will have in view of the District Court's affirmative

This is because of the forces of political inertia—which in the long years before this Court's decision in *Baker* v. *Carr*, 369 U. S. 186 (1962), acted as a brake on all state legislative reapportionment[10]—and because of the understandable tendency of incumbent legislators to protect their positions.—While this latter factor would obviously be the case in any provision for a constitutional amendment initiated by the Legislature, it would be unrealistic to assume that it would not also be a factor in a reapportionment initiated by a constitutional convention.

If as a practical matter, the apportionment of the House or the other details of the present scheme, apart from the number of Senators per Senatorial District, is removed from consideration, the number of variables which can be adjusted to reach a sound overall bicameral plan shrinks, and reaching that plan becomes more difficult.

Thus, practical considerations join with the clear teachings of this Court in establishing the error of the action of the District Court.

B. The District Court Erred in Sanctioning the "Registered Voters" Measure of Representation in Hawaii.

Not only did the District Court err in affirmatively declaring the Hawaii House of Representatives to be "constitutional and valid" in its apportionment; it also erred in not affirmatively declaring its apportionment unconstitutional. —The first basis on which we make this contention is as to the Hawaii Constitution's use of the "registered voters" measure of representation in the House.

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sanction of the "registered voters" measure, of the House multimember districting, of reapportionment immediately before the federal census, and of a system of districting which is not coordinated with census districts, is highly conjectural.

[10] See Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057, 1060-66, 1096-97 (1958).

In its February decision holding the House of Representatives of Hawaii to be constitutionally apportioned, the court considered the "registered voters" measure of representation of the House. It held that that measure "did in fact . . . result in apportionment 'substantially on a population basis'" in 1959 and was not "part of any invidious scheme to disenfranchise any person or group, or to dilute the vote of any person."[1] (R. 68, 77; 238 F. Supp., at 473, 477) But the use of registered voters is neither a permissible measure of representation in itself, nor as a matter of fact here does it produce an apportionment substantially equivalent to that which would be produced under a permissible method.

1. *A Legislative Apportionment System May Not Be Based on the "Registered Voters" Measure.*

In seeking to demonstrate a correlation between registered voters and population in Hawaii, the District Court in this case apparently recognized that an apportionment scheme cannot deviate substantially from the principle that equal numbers of persons must be represented equally. (R. 68; 238 F. Supp., at 473) A "registered voters" measure cannot be upheld in itself; and its product may be upheld only if it happens to be an adequate reflection of total popuation—and only as long as it is.

(a) In *Reynolds* v. *Sims*, 377 U. S. 533, 567-68 (1964), this Court stated:

> "Population is, of necessity, the starting point for consideration and the controlling criterion for judgment

[1] Subsequently, in permitting the presentation of a legislative Senate reapportionment plan, the court affirmatively required that any Senate plan be apportioned on the basis of registered voters in the 1964 election. (R. 89)

in legislative apportionment controversies. . . . This is at the heart of Lincoln's vision of 'government of the people, by the people, [and] for the people.' The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.

"We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.

"By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.*, at 577.[2]

Clearly, this language of the Court in *Reynolds* v. *Sims* to the effect that "population" is the measure of representation, and the opinion's references to the "equal-population principle" (*id.*, at 579), must be taken as meaning what they say. It is the Equal Protection Clause which, this Court's decisions hold, guarantees the right of equal representation. The Equal Protection Clause, in terms, is a guarantee that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." On its face, the Clause guarantees its protections to all the population of a state; and we contend that there is no rational basis, con-

[2] This Court has consistently indicated that an apportionment scheme must be based substantially on population. See *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633 (1964); *Maryland Committee* v. *Tawes*, 377 U. S. 656 (1964); *Davis* v. *Mann*, 377 U. S. 678 (1964); *Roman* v. *Sincock*, 377 U. S. 695 (1964); *Lucas* v. *Forty-Fourth General Assembly*, 377 U. S. 713 (1964).

sistent with the Clause, for drawing a distinction in terms of the right to representation between those persons who have registered to vote, and those who have not registered or who cannot register.

The right to representation is one inherent in all the people; it is not dependent on the right to vote; much less is it dependent on the exercise of the right to vote through registration or actual voting. To be sure, for purposes of standing to bring a suit to vindicate the right of equal representation, it may be necessary for the particular plaintiff to be a registered voter; historically, standing has been found through analogy to the right to have one's vote fairly counted. See *Baker* v. *Carr*, 369 U. S. 186 (1962).

But the fact that justiciability in these matters has been recognized by analogy to protection of the right to vote does not answer the question, what is the proper measure of a voter's voting power—whether it is to be measured in terms of the relative populations of the relevant voting districts or in terms of their relative number of registered voters.--Indeed, if the point of the application of the Equal Protection Clause in this area was that it guaranteed equality of strength among voters, an apportionment based on population would be constitutionally suspect, unless population happened to coincide with the number of voters on the rolls.[3] But a holding that population was not *per se*

[3] In *Sincock* v. *Duffy*, 215 F. Supp. 169 (D. Del. 1963), *aff'd sub nom. Roman* v. *Sincock*, 377 U. S. 695 (1964), the District Court held that the apportionment schemes of both houses of the Delaware legislature were unconstitutional because they were not based on equality of inhabitants per representative. In justifying its use of federal census total population figures for this measurement, the court said, "We take judicial notice of the fact that in the State of Delaware, as in the other states of the United States, there is a direct and reliable relationship between the number of inhabitants in an area and the number of electors therein and that the ratio

a permissible apportionment measure would have staggering implications, and would fly in the face of this Court's decisions.

As we have suggested, this Court's decisions indicate that the constitutional right to fair apportionment is to be measured on a population basis;[4] and this measure has histori-

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of electors to inhabitants is relatively stable." 215 F. Supp., at 175-76. This statement was dictum, and the Supreme Court on appeal did not mention it. This Court was not required to do so, because the District Court properly ascertained the unconstitutionality of the apportionment schemes on the basis of total population; it used the right figures, although for the wrong reason. As is developed below, the District Court was wrong in both its assumptions: (1) that the proper basis of apportionment is number of electors, and (2) that there is necessarily a significant correlation between distribution of inhabitants within a state and distribution of electors.

[4] Even though this Court has often spoken in terms of equality of voting power, in every opinion but one it has dealt with population, as reported by the census figures, in determining that equality. The only exception is *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633 (1964), No. 85, O. T. 1965 (decided October 11, 1965), *affirming* 238 F. Supp. 916 (S. D. N. Y. 1965). There a representation measure which was based on total population, excluding only aliens, was upheld. The District Court had found that exclusion or inclusion of aliens would make no substantial impact on apportionment. 238 F. Supp., at 925. It might well be argued that the exclusion of aliens from representation was a permissible categorization under the Equal Protection Clause. But in any event, the question whether it is always permissible to exclude aliens from the apportionment measure is, of course, not presented here. In this case, the State has deviated much further from overall population, by excluding all who are not registered voters from the measure of representation.

Of the six leading legislative apportionment cases decided in June 1964, all of the apportionment schemes except that in *Lomenzo* were judged by the Court according to census figures on population. Indeed, in *Davis* v. *Mann,* 377 U. S. 678 (1964), the Court held that it was impermissible to discriminate against certain populous areas of the state on the basis that they contained large numbers of military and military-related personnel. It is notorious that registration in the state in which they are stationed is low among the military. See pp. 65-67, *infra.*

cally been the standard in the Federal House of Representatives and in the vast majority of the states, except where unconstitutional methods such as those condemned in *Reynolds* v. *Sims* and its companion cases have prevailed.

The key to the matter is representation. Voting is merely one of a number of ways in which the citizen's right to be represented is manifested. It is merely the right to choose the individual who shall represent the citizens in the legislature. However, the right to representation is a broader right of effective participation in, and relationship to, the legislative process. It includes the right to petition the legislature, the right to bring one's needs to the attention of a particular legislator who has been elected from the citizen's legislative district, and the right to be weighted in the composition of the legislature. Voting is only one way that a citizen may make a political impact on the lawmakers; the right of representation includes all ways of bringing political beliefs or needs to bear in the legislature, including the most elemental one of being one of the factors on which legislators—responsive to their individual constituents' needs—are apportioned among districts.

This Court in *Reynolds* v. *Sims*, 377 U. S. 533, 565 (1964), stressed that the essential right to be protected was one of representation: "[R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies."

It is this right to equal representation which must be guaranteed by a legislative apportionment scheme. "[T]he achieving of fair and effective representation for all citizens

is concededly the basic aim of legislative apportionment ...." 377 U. S., at 565-66.[5]

The number of persons entitled to representation and the number entitled to vote necessarily differ in our society because of governmental limitations placed on the right to vote to guarantee mature and informed judgment by the electorate and to maintain effective administrative control over elections. However, those who may not vote are still entitled to representation. For instance, in Hawaii all persons, whether or not qualified or registered to vote, are subject to taxes imposed by the Legislature. Because of the strongly centralized state government in Hawaii, the Legislature controls the school system throughout the State. Schools are attended, at all but the highest levels, by those who are not registered voters. Most other public services are "consumed" by those who may or may not be registered voters.

The distribution throughout a state of registered or qualified voters and of the general population may not necessarily correlate. If they do not, equality of representation is denied to those areas with a low registration rate or a low proportion of persons entitled to vote. The larger an area's population, the greater its need for governmental services is apt to be; and other things being equal, the larger its tax burden. If apportionment of legislators is not consistent with the proportion of total population in an area, because of the use of a "registered voters" measure, it is clear that the more populous areas, if compara-

[5] In *Baker* v. *Carr*, 399 U. S. 186 (1962), it was unclear what measure of representation the plaintiffs were contending for. See 369 U. S., at 189-90 n. 4. However, the Court made it clear in *Reynolds* v. *Sims*, *supra*, 377 U. S., at 556, that: "We intimated no view [in *Baker*] as to the proper constitutional standards for evaluating the validity of a state legislative apportionment scheme."

tively low in registered voters, are not likely to receive public services in proportion to their needs or in proportion to their tax burdens. A patent inequality of representation would therefore exist.

(b) Indeed, the traditional way in which equality of representation had been guaranteed in this country has been to apportion representatives according to total population. The prime example is the apportionment of the Federal House of Representatives. The members of the House are apportioned among the several states according to the number of inhabitants of each state. U. S. Const. Art. I, § 2; Amend. XIV, § 2. Moreover, congressional districts within a state must include substantially equal numbers of inhabitants. *Wesberry* v. *Sanders,* 376 U. S. 1 (1964). "The history of the Constitution, particularly that part of it relating to the adoption of Art. I, § 2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, . . . it was population which was to be the basis of the House of Representatives." *Id.,* at 8. There is "no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Id.,* at 18. This Court held that, if representation was not based on inhabitants, equality of voting power was denied to some voters; however, it is obvious that the Court assumed that voting power was equal only if the representatives represented equal proportions of the total population:

> "The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent 'people' they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number

> of the State's inhabitants. The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure 'fair representation of the people,' an idea endorsed by Mason as assuring that 'numbers of inhabitants' should always be the measure of representation in the House of Representatives. The Convention also overwhelmingly agreed to a resolution offered by Randolph to base future apportionment squarely on numbers . . . ." 376 U. S., at 13-14.[6]

Indeed, it does not appear that more than eight states follow a "registered voters" or "qualified voters" measure of apportionment.[7] And even in those states, the choice of

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[6] To be sure, in *Reynolds* v. *Sims, supra,* this Court indicated that analogies between state and federal legislative schemes are not always valid. "Nevertheless, *Wesberry* clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." 377 U. S., at 560-61. To guarantee this equality of representation, population must be the measure, and registered voters cannot stand as a measure except to the extent it happens to produce substantially the same result.

Indeed, *Reynolds* v. *Sims* relied heavily on the *Wesberry* case. *Wesberry* drew on the theory of equal representation through apportionment on the basis of total population established by the framers of Article I of the Federal Constitution. From this theory the Court derived its doctrine of "one man, one vote," which it applied in *Reynolds* to state apportionment cases. Although the House of Representatives scheme may not be a mandatory plan for all state legislatures, "a careful reading of *Reynolds* v. *Sims,* and particularly its analysis of the foundation for the 'one person one vote' concept, makes clear that the basic constitutional protection is one of equal representation by population, and not equal representation by registered voters." *Ellis* v. *Mayor of Baltimore,* 234 F. Supp. 945, 953 (D. Md. 1964), *aff'd,* 34 U. S. L. Wk. 2215, 4th Cir., October 11, 1965.

[7] Arizona, Ariz. Const., Art. IV; Hawaii; Idaho, Ida. Const., Art. III; Massachusetts, Mass. Const., Amend. LXXI; Rhode Island, R. I. Const., Art. XIII, Amend. XIX; Tennessee, Tenn. Const., Art. II; Texas, Tex. Const., Art. III; Vermont, Vt. Const., Art. II.

the "registered voters" or "eligible voters" measure generally appears not to have been one designed to reach a measure permissible in itself, but a choice made simply as an effort to gauge the total population. Indeed, the proceedings of the Hawaii constitutional convention demonstrate that the "registered voters" measure was chosen there precisely for this reason—that it was thought accurately to reflect total population, not because it was thought to be a justifiable measure in itself. In the convention it was stated:[8]

> "The idea among other things was to make the districts as nearly equal population-wise as possible . . . ." (Proceedings, p. 107)

> "One of the reasons why the reapportionment directed by the Organic Act was not carried out was because that Act required reapportionment on the basis of citizen population. A breakdown of the population according to this standard has not been locally available. Total population figures for the Territory are shown by census tracts which do not necessarily coincide with locally defined areas. *As a practical matter, the number of registered voters was found to bear a reliable and fairly uniform relationship to total population, although it favors slightly the neighbor islands where the percentage of persons who have registered to vote is from one to two per cent higher than for Oahu.* It was in recognition of the potential difficulty in obtaining figures which would show citizen population or figures which would show total population by desirable districts, that the basis for reapportionment of the members of the House was chosen as the number of registered voters." (R. 347-48) (Emphasis supplied)

[8] As we will demonstrate in point 2 of this subpart, in Hawaii the use of the "registered voters" measure does not, in fact, result in equal representation on a population basis.

2. *The Hawaii "Registered Voters" Measure Does Not in Fact, Produce a Constitutionally Permissible Apportionment.*

The District Court apparently concluded that the "registered voters" measure used in apportioning the Hawaii House of Representatives results in representation similar to that which would be obtained if population—or at least civilian population—were the measure. (R. 68-77; 238 F. Supp., at 472-77) It also concluded that the use of the "registered voters" measure did not invidiously discriminate against any class of persons in the population. (R. 77; 238 F. Supp., at 477) We shall show that the Hawaii "registered voters" measure does not produce an apportionment substantially equivalent to a general population measure—as indeed the District Court appeared to concede—in seeking to equate the effect of the "registered voters" measure simply with that of a "civilian population" measure. We shall also show that use of the "registered voters" measure does in fact result in invidious discrimination, and that in fact it does not even substantially accord with a "civilian population" measure, although we contend that that measure is not itself justifiable under the Equal Protection Clause.

(a) *Use of a population measure would result in a greatly different apportionment for the Legislature than the "registered voters" measure.*[9]—The disparity between the appor-

[9] The only justification for the use of "registered voters" given by the constitutional convention was its supposed substantial equivalency to a population measure. We refute this justification at this point. Other possible justifications are taken up below, pp. 64-70, *infra*. This Court has said that "So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible. . . . " *Reynolds* v. *Sims*, 377 U. S. 533, 579 (1964). In the present case, all possible reasons for the use of a "registered voters" measure involve invidious discriminations or false presumptions.

tionment that would be produced in the Hawaii House through a population measure and through a "registered voters" measure is graphically illustrated by Plaintiffs' Exhibit 1. (R. 339) This table also illustrates the disparities that would be created between a reapportioned Senate (using the old Senatorial Districts) in terms of the population measure versus the "registered voters" measure. The table uses, as a basis of comparison, the population and registered voter count in 1960, the last year in which there was a federal census.[10] The table indicates that ten of the eighteen Representative Districts would have a different number of Representatives under a population measure from that under a "registered voters" measure.

In the case of two districts, the disparity is gross: that is, the difference in number of Representatives is more than one. Thus, in the Tenth Representative District, a population measure would yield eight Representatives, while a "registered voters" measure yields four. And in the Elev-

[10] As a threshold matter, the District Court erred in holding (R. 68; 238 F. Supp., at 472) that these figures were not apposite because the present House reapportionment occurred in 1959, on the basis of 1958 registered voters, at which time the 1950 census was the last available. The court suggested that the discrepancy between total population and registered voters must be shown as of 1950 or 1958, presumably through false analogy to the proposition that reapportionment need not occur more often than once every ten years. But as we have already suggested (p. 37, *supra*), the Hawaii Constitution's provision for reapportionment immediately before the federal census is part and parcel of its approach of using "registered voters." The District Court's argument, accordingly, appears to be a bootstrap one. Clearly in passing on the validity of a reapportionment which occurred in 1959, and before affirmatively sanctioning the "registered voters" measure on a prospective basis, the District Court should have compared the population figures for 1960 either with the 1958 registration figures which were the basis of the 1959 reapportionment, or at least should have compared the 1960 "registered voters" figures with the 1960 census figures, as we will henceforth do in the text for purposes of comparability.

enth Representative District, a population measure would yield five representatives, while the "registered voters" measure yields three.

To put the matter a different way, if the House were apportioned on the basis of 1960 registered voters, a Representative District, the Tenth in Oahu, with a 1960 population of 95,118, would be entitled to the same number of Representatives as the Fourteenth District with a population in 1960 of 42,476, as the Sixteenth with a 1960 population of 42,~~476~~ 756, and as the Seventeenth with a 1960 population of 36,956. Therefore, the Seventeeenth District, with less than forty percent of the population of the Tenth District, would be entitled to an equal number of representatives.

These disparities are confirmed by a table showing average representation *per capita* in the House. (Governor's Ex. GO-1, R. 407) Representation ranged in 1960 from one Representative per 5,030 persons to one Representative per 23,779 persons. In six of the eighteen districts, one Representative represented less than 9,000 persons. In four of the districts one Representative represented more than 17,000 persons.

It is also of interest to observe the inequities that would be caused by application of the "registered voters" measure to the larger districts which will presumably be adopted in reapportioning the Senate.—Of course, unless use of the "registered voters" measure in the House is held unconstitutional, it presumably will be followed in the Senate as well.[11] It would appear most unlikely that different measures of representation would be used in the two houses.

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[11] Indeed, at one point the District Court ordered it followed in the Senate. (R. 89)

Plaintiffs' Exhibit 1, R. 339, indicates—using the old Senate Districts—that even greater disparities are produced as between the "registered voters" measure and the population measure in the larger Senate Districts.[12] In four of the six Senatorial Districts, a different number of Senators results depending on the measure used, and in two of these four the disparity is gross, that is, by more than one Senator. Thus, in the Fourth District, the use of population yields seven Senators, the use of "registered voters" nine; in the Fifth Senatorial District, the use of population would yield thirteen Senators, and the use of "registered voters" nine.—Thus the use of "registered voters" would give each district the same number of Senators, although the Fifth District had a 1960 population of 318,102, while the Fourth District had a population of 182,307. Yet, to "give the same number of representatives to unequal numbers of constituents" is to deny the equal protection of the laws. *Reynolds* v. *Sims, supra,* 377 U. S., at 563.

To put the disparity in percentage terms: The proportion of the population which is registered varies among the House Districts. For instance, as to population in 1960, the Ninth District had 17.3% registered voters, while the Fifth District had 48% registered voters. Among the previous Senate Districts the percentage varied from 23% in the Fifth District to 43.5% in the First District. (R. 362)

Such substantial deviations from the basis of population vitiate the House apportionment as a permissible approximation of population.[13]

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[12] This demonstration shows that the disparity between the results under the two measures is not readily correctible by using larger districts.

[13] In *Ellis* v. *Mayor of Baltimore,* 234 F. Supp. 945 (D. Md. 1964), the District Court held that "Consideration of registered voters [as a basis for apportionment of a city council] is not im-

(b) *The "registered voters" measure discriminates invidiously against certain groups.*—In general, and particularly in the context of Hawaii, the use of the "registered voters" measure underrepresents certain groups of the population. We will review these groups one by one.

(i) Persons living in areas of low proportions of registration.

Under the Hawaii measure, by definition the person who is eligible to vote but unregistered obtains less representation for the whole of the ten-year period between reapportionments than does the registered voter. It must also, however, be remembered that even the registered voters in his geographical area are afforded reduced representation solely because they live near the person who is eligible to vote but unregistered.

While it may be reasonable, in the light of administrative considerations, to condition the right to vote on registration during a period preceding an election,[14] it surely is not reasonable to diminish a man's vote for a ten-year period because he was not registered at a particular point of time.

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proper if a valid result based upon population is reached, but encouragement of voter registration, although a worthy political and social objective, is not sufficient to support a weighting of votes in the ratio of 1.66 to 1, where the percentage of registration to population is approximately 36% in the first councilmanic district and approximately 33% in the second." 234 F. Supp., at 958. As the Court of Appeals stated in affirming the District Court's disapproval of the "registered voters" measure: "This is no insignificant departure from the criterion of population made mandatory by the Constitution as interpreted by the Supreme Court." 34 U. S. L. Wk. 2215 (4th Cir., October 11, 1965). The Court of Appeals found that 30% of the total population in one district was registered, while 51% of the population of another district was registered.

[14] *Cf. Drueding* v. *Devlin*, 234 F. Supp. 721 (D. Md. 1964), *aff'd*, 380 U. S. 125 (1965).

Moreover, it is clear that the "registered voters" measure causes registered voters in areas of underregistration as much deprivation as it does eligible, unregistered persons.[15] Thus all who live in the same district as an eligible, unregistered person, as of the date chosen for reapportionment, by that token and to that extent have their votes diluted—merely because of their place of residence.[16] No dilution of a citizen's vote should occur merely because of his neighbors—because they are uninterested in politics, too old and ill to register, unwilling to bother, or for any other reason do not register.[17] And despite the expression of the District Court to the contrary (R. 74; 238 F. Supp., at 476), there is a substantial number of eligible voters in Hawaii who are not registered to vote. The total possible voting population for 1964 was approximately 294,800. Of these per-

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[15] On this specific point, we will argue on the narrowest possible basis—that a system of representation based on "eligible voters" as a measure might be permissible. Even if this were so, it would not follow that the use of the "registered voters" measure was permissible.—Thus, even if this Court's cases were to be read to guarantee simply the right to vote, without regard to questions of equality of representation, the discrimination against geographical areas with low registration rates in terms of number of eligible voters would be enough to invalidate the "registered voters" measure.

[16] Thus the use of the "registered voters" measure cannot be sustained as a device to encourage registration. It penalizes the unregistered person's neighbors as well as him. See also [illegible] v. *Mayor of Baltimore, supra,* n. 13, pp. 55-56.

[17] It scarcely needs underscoring in this day and age that there are substantial areas of the country where systematic practices exist which prevent eligible persons from registering. If nothing else, the theory of the Voting Rights Act of 1965, Public Law 89-110, 79 Stat. 437, is witness to this. But the use of "registered voters" as a basis for apportionment would doubly reward success in preventing racial groups from registering; the areas in which they reside could thus be underrepresented.

We hasten to add that there are no racial patterns charged as to the percentage of registration to eligible voters in Hawaii. See n. 11, p. 80, *infra.*

sons eligible to vote, 55,400, or almost one-fifth, were not registered.[18]

And indeed there are significant variations in Hawaii, from area to area, on the proportion of registration among those eligible to vote. On Oahu, the most populous and urban island, 82.8% of the eligible voters were registered in 1960 while in the County of Hawaii 102.3% of those eligible were registered.[19] (R. 364)

(ii) Areas which have in the past received less representation than that to which they were entitled.

It is interesting to note that the areas with the lowest registration rate per population[20] are those which were deprived of equal representation in the unconstitutional

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[18] The statistics used by the District Court in reaching its conclusion that over 87% of the possible voting population of the State were registered contain a statistical error in that they included in the number of registered voters military personnel who had registered, while excluding all military personnel eligible to register from the total eligible voters.

Our figures correct this error and are derived as follows: In 1964, there were 283,400 civilians eligible to register. (Plaintiffs' Ex. 14, Table 7, R. 366). To this figure must be added 11,400 military personnel and adult dependents who met the qualifications for registration. (*Ibid.*, n. 1, R. 366 n. 1) (The figures for military eligibles are as of 1962 but it appears that this would be a conservative estimate for 1964. See Plaintiffs' Ex. 15, Table 4, R. 382). This indicates 294,800 as the total possible voting population. Registration for the 1964 general election was 239,361. (Governor's Ex. GO-4, R. 410).

[19] The reason the number of registered persons sometimes exceeds those eligible is that the eligibility figures are taken as of an earlier date than the registration figures and exclude military personnel, some of whom are registered. (R. 265, 364, 366) Thus, the percentages are useful basically for comparative purposes among themselves.

[20] Or per eligible voters, for that matter. See Plaintiffs' Ex. 14, R. 364.

apportionment of the original Senate scheme. Only 51.6% of Oahu's population over twenty years of age is registered, although all other basic areas have a registration of between 69.3% and 75.3%. Interestingly enough, the same is the case even in terms of eligible voters; only 82.8% of Oahu's eligible voters are registered, while between 99.8% and 102.3% of the eligible voters in the other basic areas are registered. (R. 364) Oahu concededly was the area discriminated against in the original Senate.

Persons in an area of underrepresentation have less inducement to vote than those in overrepresented areas, because their vote is less effective in decision making. Any use of a "registered voters" measure therefore tends to "lock in" previous malapportionment.[21]

In the 1958 pre-statehood election, on the registered voters for which House representation is currently based, the Hawaii Legislature was apportioned according to the Organic Act of Hawaii, which resulted in a serious discrimination against the populous area of Oahu.[22] Use of the

[21] In *WMCA, Inc.* v. *Lomenzo*, 238 F. Supp. 916 (S. D. N. Y. 1965), *aff'd*, No. 85, O. T. 1965, October 11, 1965, the District Court held that a proposed reapportionment plan based on a "registered voters" measure was unconstitutional because it was a "ghost of prior malapportionment." 238 F. Supp., at 924. Prior malapportionment had discriminated against urban areas; New York City under the apportionment measure of "citizens" would control 45.7% of the apportionment, but under a "registered voters" measure would control only 41.9%. In *Buckley* v. *Hoff*, 243 F. Supp. 873 (D. Vt. 1965), a "registered voters" measure was upheld, but only because it was substantially equivalent to a population measure, and only after the court found that it would not in fact perpetuate the effects of prior malapportionment. 243 F. Supp., at 876.

[22] The Organic Act, passed in 1900, established a Senate with four districts and fifteen members apportioned as follows:

(continued on following page)

"registered voters" method tends to carry forward this discrimination. Likewise, the Legislature's Senate plan which the court below held invalid was based on 1964 registered voters.[23] In 1964, the unconstitutional Senate provisions were in effect for purposes of the election. Therefore, the "registered voters" measure, as applied in the Senate Plan, similarly discriminated against Oahu.

This Court should not allow the effects of the previous malapportionment of Hawaii to be continued by use of the "registered voters" measure.

(iii) The poor and the communities in which they live.

The use of the "registered voters" measure in Hawaii discriminates against persons according to their economic condition. *Cf. Griffin* v. *Illinois,* 351 U. S. 12 (1956); *Douglas* v. *California,* 372 U. S. 353 (1963).

Hawaii	4
Maui	3
Oahu	6
Kauai	2

§§ 30, 31, 32, 31 Stat. 146-47 (1900), 48 U. S. C. §§ 565, 568-69 (1952).

It established six Representative districts, two on Oahu and on Hawaii and one on Maui and on Kauai. The thirty Representatives were apportioned as follows:

Hawaii	1st District—4
	2nd District—4
Maui	3rd District—6
Oahu	4th District—6
	5th District—6
Kauai	6th District—4

§§ 35, 38, 39, 31 Stat. 147-48 (1900), 48 U. S. C. §§ 570, 574-75 (1952).

Thus Oahu elected 40% of the Senate and the House of Representatives in the 1958 elections, although it had approximately 70% of the State's registered voters and 79% of its total population as of 1960. (R. 55)

[23] In fact, by order of the court. (R. 89)

The proportion of registered persons in Hawaii in the lower economic brackets is substantially less than those in the higher. As of January, 1961, among the eligible voters on Oahu with a family income of less than $4,000, only 43.8% were registered; while among those in the $10,000 to $14,999 bracket, 72.4% were registered; and among those in the $15,000 or more bracket, 77.7%, were registered. (R. 369) It is apparent that the use of registered voters unduly favors those on the higher economic levels and discriminates against those on the lower.

Moreover, this invidious discrimination against the poor necessarily also constitutes a discrimination against impoverished areas, or those containing significant "poverty pockets." Therefore, areas which perhaps most need representation in the Legislature are receiving the least.

(iv) The illiterate and the areas in which they live.

Literacy in English or Hawaiian is a condition imposed on the right to vote in Hawaii. Hawaii Const., Art. II. Because the measure used in Hawaii is "registered voters," the right to representation of illiterates is reduced. Even though illiterates may not vote because of a decision that their judgment in choosing a representative may be ill-formed, they still have a right to representation which should be afforded by the legislative apportionment measure.

Moreover, even registered voters residing in an area with a high concentration of illiterates are denied equal representation for their area. The poorly educated, like the indigent, are likely to be concentrated in specific geographical areas. Although these areas may need schools, libraries, and other facilities to a greater extent than areas of the

well-educated upper-middle-class citizens, the areas are effectively denied the representation to which they are entitled and therefore are likely to receive fewer facilities than the more educated and affluent areas.

Such a discrimination deprives these persons and others living near them of the equal protection of the laws.[24]

(v) Areas with a low median population age.

To be eligible to vote in Hawaii one must be twenty years old or older. Hawaii Const., Art. II. Evidence before the court below established that in Hawaii, like in most states —and particularly those which are attractive for retirement—some communities consist mainly of elderly, retired persons and others of young families with many children. (R. 271-72, 330, 364) Areas with many children are discriminated against by the "registered voters" measure. Two communities may have only 500 registered voters each, but if one community consists predominantly of the elderly and the other of families with an average of two or three children, it is obvious that their total population differs considerably.

Areas with many children clearly have a greater need for schools, recreational facilities, and libraries than areas with few children; however, these greater needs—which in Hawaii's centralized form of Government are principally a State responsibility—are not reflected in the "registered voters" measure of representation.

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[24] The District Court's statement that Hawaii has "an unusually literate citizenry" (R. 74; 238 F. Supp., at 476) does not diminish the significance of the discrimination against the illiterate and those who live near them, and it does not suggest that the illiterate are evenly distributed throughout the State. The court had no evidence before it concerning literacy rates.

(vi) The military and the areas in which they live.

The District Court held that military members and their dependents need not be reflected in the representation base to the extent that they are unregistered, and disapproved of a total-population apportionment for Hawaii because the presence of military personnel in certain areas would be reflected by that method. (R. 70-73; 238 F. Supp., at 473-75) It also used the existence of military personnel to explain deviations between population and registered voters in Hawaii. (*Ibid.*)

As to the second holding, the District Court was clearly wrong. The proportion of *civilian* persons who were registered voters in Hawaii in 1960 varied from 22% in the Tenth Representative District to 48% in the Fifth District. In the Fifth District, one Representative represented 5,666 civilians, while in the Tenth District one Representative represented 18,976 civilians. In five districts less than 30% of the civilian population was registered, while in seven districts 40% or more is registered. We set the statistics out in the margin.[25] These deviations are substantial, and the "registered voters" measure therefore violates the

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Repr. Dist.	1960* Registered Voters	1960** Civilian Population	Per Cent Registered
1	2,257	5,030	44
2	14,036	31,448	44
3	2,973	7,714	38
4	4,073	11,221	36
5	2,720	5,666	48
6	2,574	7,116	36
7	14,965	35,694	41

* From Plaintiffs' Ex. 1. (R. 339)

** From Plaintiffs' Ex. 16. (R. 391)

(continued on following page)

Equal Protection Clause even if one were to agree with the court's first holding—that the military may be ignored in an apportionment scheme except to the extent that they are registered voters.

However, the District Court also erred in its first holding. This Court has rejected an argument that an apportionment scheme may properly discriminate against the military by ignoring them in the representation measure. In *Davis* v. *Mann*, 377 U. S. 678, 691 (1964), the Court held:

> "We reject appellants' argument that the underrepresentation of Arlington, Fairfax and Norfolk is constitutionally justifiable since it allegedly resulted in part from the fact that those areas contain large numbers of military and military-related personnel. Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible." [26]

Here the District Court has clearly discriminated against the military and their dependents as such. Even apart from the teachings of *Davis*, the military and their dependents

8	18,369	62,532	29
9	7,410	30,933	23
10	17,003	75,895	22
11	12,553	53,263	23
12	10,000	25,372	39
13	7,807	27,220	28
14	16,056	40,967	39
15	25,869	58,322	44
16	16,176	42,430	38
17	15,880	36,648	43
18	11,338	28,034	40

[26] See also *Wilkins* v. *Davis*, 33 U. S. L. Wk. 2364 (Va. Sup. Ct. App., January 18, 1965).

are entitled to representation in Hawaii. The relationship of the military population to the civilian community in Hawaii is substantial. (R. 287-90)[27] In Hawaii, expenditures by the military establishment exceed the revenues from the sugar, pineapple, or tourist industries. The military establishment employs thousands of civilians. Military personnel send their children to the public schools of the State,[28] are subject to State laws, pay State sales tax whenever they make a purchase in the civilian community, and partake of the entertainment, cultural, and recreational facilities in the State. Many of them own or rent homes off-base.[29] Therefore, their needs from, and obligations to the State of Hawaii are similar to those of the civilian population. That few of them are registered voters is not a basis for discrimination against them.[30]

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[27] In 1960, all military personnel and their dependents were included among the "people" of Hawaii in determining the number of Representatives in Congress to which Hawaii was entitled. They should also be included in determining representation in the State Legislature.

[28] Fifteen percent of the public school children are military dependents. (R. 288) Certainly the areas where this impact occurs deserve a population-based representation.

[29] Of the military household heads on Oahu, 71.5% have lived in the State at least a year, and 11.4% over five years. There are about 24,000 Oahu households headed by service members. (Defendants' Ex. A, R. 395)

[30] Moreover, there has been discrimination against the military's right to vote in Hawaii. Therefore, even assuming that eligible voters, rather than population, were a permissible basis for apportionment, the present scheme would have to fall.

The Hawaii House is presently apportioned on the basis of 1958 registered voters. The qualifications for voting in that election were established by the Organic Act of the Territory of Hawaii, which absolutely prohibited voting for the Territorial Legislature by military personnel and their dependents. "No person shall be allowed to vote who is in the territory by reason of being in the Army or Navy or by reason of being attached to troops in the

The District Court's decision seems to have been influenced by an unwarranted fear of the size and fluctuation of the military population in terms of participation in the representation base.

Hawaii, since annexation in 1898, has always been an important military base, and the number of members of the armed forces stationed in Hawaii has been relatively stable, as indicated in the following United States Census Bureau data (Plaintiffs' Ex. No. 15, Table 9, R. 388):

1947	38,000	1956	58,000
1948	33,000	1957	60,000
1949	31,000	1958	55,000
1950	21,000	1959	56,000
1951	44,000	1960	59,000
1952	55,000	1961	61,000
1953	48,000	1962	79,000
1954	38,000	1963	60,000
1955	56,000	1964	60,000

In approximately the same period (1946 to 1962) the civilian population increased from 470,163 to 635,888 and the number of registered voters increased from 103,180 to 221,650. (R. 360)

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service of the United States." § 63, 31 Stat. 152 (1900), 48 U. S. C. § 619 (1952).

A *per se* prohibition against military voting like that in the Organic Act, if promulgated by a State, would violate the Equal Protection Clause, as this Court held in *Carrington* v. *Rash*, 380 U. S. 89 (1965). A scheme of legislative apportionment based on such an unconstitutional system of registration denies equal protection of the laws.

Present practices defining qualified voters do not discriminate against the military to the extent prevalent under the Organic Act. (R. 283) Military-related personnel may register if they live off-base and comply with special requirements regarding proof of residence and domiciliary intent. However, those persons required to live on a military base may not register notwithstanding domiciliary intent. *In re Robinson*, Hawaii Sup. Ct., Oct. 30, 1964, unreported memorandum decision. The *Robinson* decision was rendered a short time prior to the 1964 elections and was used as a criterion of registration in those elections.

The court below pointed to the abnormal wartime situation in Hawaii in 1944 when the military population was almost equal in size to the civilian population and expressed the fear that thereby "areas which normally would have a total population entitling them to but a small percentage of the total number of legislators would suddenly find themselves controlling over 90% of the legislature. . . ." (R. 72; 238 F. Supp., at 474-75)

But this inflation was not so much caused by the presence of additional permanently stationed personnel, as by the flow of troops in transit. Hawaii was a staging area for the Pacific war. Legislators or the convention amending the State Constitution could find means of coping with such extraordinary wartime or emergency situations.[31] For example, one method might be to include within the apportionment base only those persons who have been in the State for at least one year, thus excluding military and civilian transients alike. Another might be to provide for certain similar exclusions if the censal period should come at a time of national emergency. The abnormalities of 1944 are a poor excuse not to provide representation for what has been a stable factor in Hawaii for the past two decades; they do not justify a discrimination against the military as such.

3. *Since the Hawaii Constitutional Provisions Provide for Continuing Reapportionment of the House on a "Registered Voters" Measure, They Cannot Be Sustained Even if the Present Apportionment Happened to Coincide Substantially With That Produced by a Population Measure.*

Finally, even if the "registered voters" measure presently happened to produce a result substantially equivalent

[31] The Governor has never taken the position that total population as indicated in the Federal Census as we know it today is the

to that of a population measure—which it does not, as we have demonstrated in subpart 2 above—the provisions of the Hawaii Constitution providing for it clearly could not be sanctioned on that basis.

(a) The Hawaii House reapportionment section (Article III, Section 4) provides for decennial reapportionment, in the years 1969, 1979 and so forth, "on the basis of the number of voters registered at the last preceding general election." Thus there is before this Court, as there was before the District Court, not only the question whether the actual present apportionment of the Hawaii House can be squared with the Equal Protection Clause, but also whether the use of the "registered voters" measure on a continuing basis can be affirmatively upheld. The District Court declared this section of Article III of the Hawaii Constitution to be "constitutional and valid" under the Federal Constitution, and thus approved prospectively the continuing use

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only permissible measure of representation. The District Court evidently understood the Governor's position that the appropriate representation measure was one that related to population, rather than to voters, as meaning that the raw figures had to be followed literally, and thus expanded on what it considered the "grossly absurd and disastrous results" (R. 71; 238 F. Supp., at 474) which might follow on account of the size and fluctuation of the military population, and because of persons visiting as tourists, ships' crews, and the like. We do not contend that the raw census figures are the only permissible measure, and accordingly the consequences adverted to by the court need not follow.

The point is, however, that while the District Court might have demonstrated certain instances in which raw census population would not be an entirely appropriate measure, this demonstration does not validate the use of the "registered voters" measure. The starting point must be population. If the census figures must be refined in order to obtain a fair estimate of the nontransient popuuation of the State, then this should be done. But this is not an excuse for use of a measure of representation—the "registered voters" measure—which starts from an entirely different premise from that of population.

of the "registered voters" measure for future reapportionments.

We submit that this holding was in clear error. We have demonstrated in point 1 above that the "registered voters" measure cannot be sustained as an appropriate measure in itself. It could only be sustained on the basis of its correspondence, in result in a particular instance, with a permissible population-based measure.

But obviously there is no way of predicting what correlation will exist between registered voters and population in the future in Hawaii. Number of registered voters depends on many variables other than the population total —age, residence, economic condition, education, number of children per family, political interest, and so forth.[32] Therefore, even if at any given time the "registered voters" measure happened to yield results equivalent to a population measure, it could not be upheld on a continuing basis as an appropriate measure.[33] The District Court's holding

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[32] For one thing, the "registered voters" measure underestimates the more rapidly growing areas (both in terms of migration and of birth rate)—and overestimates the shrinking areas—because of the residence requirement for registration and the fact that one may remain lawfully registered in an area for a time after moving. Thus the use of registered voters magnifies the unavoidable but still undesirable lag in responsiveness to population shifts caused by the lapse of time between reapportionments.

[33] Even if one were to assume that registered voters had a significant correlation with total population over a long period of time, registered voters constitute such a small proportion of the total population that shifts in the number of registered voters at any particular time would not necessarily reflect shifts in total population. The number of registered voters is so small that it would tend to change rapidly within the State as a whole and within districts of the State particularly. For a discussion of the "law of large numbers" which establishes that the larger the numbers used the smaller the fluctuation, see R. 318. If this basis were to be approved, reapportionment once every ten years, based on a particular point in time, as provided by the Hawaii Constitution,

to the contrary, which did not even essay to prophesy future correlation, was in clear error.

(b) In addition, the "registered voters" measure effectively inhibits comparison of total population and registered voters in Hawaii. The "registered voters" measure permits a scheme of district boundaries in Hawaii which are badly out of phase with census boundaries. Hawaii uses its precinct registration, rather than census figures, to determine the number of registered voters. Also, apportionment occurs at times other than the time of the federal census—1959 and every tenth year thereafter as to the House.[34] Rather than justifying the measure, as the District Court found, this condemns it; in light of the probable substantial deviations between registered voters and total population, any rational plan must at least allow comparison to assure some correlation in fact.[35]

C. The District Court Erred in Sanctioning the Multimember Districting Scheme in the House.

The second basis on which we urge that the apportionment of the Hawaii House of Representatives should have

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might well be inadequate to reflect total population shifts or even to reflect the probable distribution of registered voters in following periods.

[34] 1975 and every tenth year thereafter in the proposed Senate plan.

[35] If this Court finds the "registered voters" measure to violate the standards of equal protection of the laws, the provisions concerning the time of reapportionment of the House should also be held to be invalid. For reapportionment occurring nine years after the federal census would create a legislature which would be based on population distribution up to nineteen years previously. This would be "constitutionally suspect" (*Reynolds* v. *Sims, supra,* 377 U. S., at 584) in itself, and the circumstances in Hawaii would confirm the suspicion: such a time-lag after the census is not administratively necessary—indeed, it is permissible only if the "registered voters" measure is used—and would be highly unreasonable in light of the rapidly shifting Hawaii population.

been affirmatively declared unconstitutional is its arbitrary use of multimember districts.—In this subpart, we will also develop some of the bases for the reasoning which, in part II, we will urge in support of the District Court's rejection of the Legislature's plan for Senate reapportionment, although the Senate plan clearly presents a much more aggravated case, particularly when taken against the backdrop of the House.

As the table reproduced at p. 10, *supra,* indicates, the Hawaii House is composed of a variety of single-member and varying multimember districts. Only five of the present 18 House of Representative Districts are single-member districts. Two Representative Districts have two members each, four have three members, six have four members, and one has six members. Five of the six four-member districts are on Oahu, as is the six-member district. The average number of Representatives per district in Oahu is 3.6, and there is no single-member district on Oahu. —All but one of the proposed Senate districts, under the proposed scheme that the District Court held unconstitutional in its April order, were multimember districts. Indeed, in view of the multimember system of districting in the House, and the predictable tendency of any proposed Senate reapportionment to create larger districts than the House districts,[1] it may well be assumed that any plan for Senate reapportionment will include—and probably be dominated by—multimember districts unless the system of multimember districts in the House is invalidated.

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[1] The legislative history of the Legislature's proposed Senate reapportionment plan shows that one of the purposes in drafting the plan was to create Senate districts which were larger than existing House districts. (R. 123-24, 127-28) Historically, Senate Districts in Hawaii have been larger than Representative Districts.

We recognize that in *Fortson* v. *Dorsey*, 379 U. S. 433 (1964), a system involving multimember districts employed in Georgia was held not to violate, on its face, the Equal Protection Clause. Under the system in *Dorsey*, Senatorial districts were based on population, but if a county was entitled to two or more districts on that basis, all voters of the county were entitled to vote for Senators from each of the county's districts. Thus, to that extent, the counties which had more than one district became multimember districts. On appeal, this Court held simply that there was no mathematical disparity between the weight of votes in single-district counties and that in multidistrict counties, and that therefore there was no *per se* violation of the Equal Protection Clause.

The Hawaii House's multimember districting system presents a situation clearly distinguishable from that in *Dorsey*:

(1) In *Dorsey*, the system of multimember districting was drawn on a uniform, historical basis, not shown to be arbitrary. In the Hawaii House, the multimember districting within the "basic areas" is purely arbitrary, particularly as district size is concerned.

(2) *Dorsey* did not deal with the question of submergence of minorities within large multimember districts; this matter was expressly left open by the Court. (379 U. S., at 439) Indeed, *Dorsey* involved the election of 54 legislators from 54 districts; this acted as a brake on submergence of minorities and tends toward the development of identifiable constituencies. In Hawaii, there is evidence of submergence of minorities.

(3) The only challenge in *Dorsey* was to the deprivation of equal voting weight; while in the present case,

the deprivation of other elements of the right to representation on an equal basis is challenged.[2]

1. *The arbitrariness of the construction of the districts.* —The Hawaii House districts are constructed in a completely arbitrary fashion. Within the "basic areas," they are not constructed uniformly on boundaries having independent significance. In contrast to the system upheld in *Dorsey,* no uniform or reasonable policy was followed in their creation. Some districts follow lines established for election, educational, judicial, and taxation purposes. Others straddle such lines. (R. 320-25) Even more significantly, while individual lines may have been "historical, political, geographic [or] physical," as the District Court said (R. 75; 238 F. Supp., at 476), there is no suggestion of any fixed or rational scheme accounting for the *size* of the various districts. Thus there is nothing of record in any respect suggesting or indicating why certain districts should be drawn so as to require as many as six Representatives on the "registered voters" measure employed, and others only one.[3] The District Court's opinion is also completely silent on this whole matter.

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[2] Moreover, appellees in *Dorsey* argued that the voting weight of voters in the multidistrict counties was less than that of voters in single-district counties. Here, we argue that the right to representation of the residents of single-member districts is impaired as compared with that of residents of multimember districts.

Also, in *Dorsey* this Court considered a legislature in which only one house was apportioned through the use of multimember districts. The proposed Senate plan involved in this case was based on a multimember district plan—as was the original Senate apportionment declared unconstitutional by the District Court—thereby creating a situation in which both houses of the Hawaii Legislature were to be subject to multimember districting. We will discuss the proposed Senate plan in Part II, *infra.*

[3] Indeed, the only stated policy in the constitutional convention as to the construction of districts appears to have been the very

Other factors indicate the arbitrariness of the boundaries and district size in this random multimember districting scheme. Unlike the districts in most states, the districts in Hawaii were drawn in such a way as to create a substantial lack of cohesion with census tracts, and thereby prevent any meaningful use of the federal census figures in reapportionment.[4]—These figures are, of course, the basis for reapportionment of the Federal House of Representatives and that of the legislatures of most states.

Another factor suggesting arbitrariness is the fact that in the decennial reapportionment by the Governor, the last, rather than the first, resort in reapportionment is the redrawing of the districts. The Constitution "freezes" the districts originally created, providing that in the event of population shifts, the device the Governor is to follow in reapportionment is changing the number of Representatives per district. Only as a last resort—when on a mathematical basis the indicated apportionment in a Representative District falls below one-half of a Representative—is there to be any change of the district boundaries. (Article III, § 4) In view of the arbitrary nature of the original construction of the districts, this provision appears itself to be confirmatory evidence of arbitrariness.

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usual and conventional policy of creating Senate Districts with larger constituencies than Representative Districts. Obviously, the use of multimember Representative Districts subverted this policy by the creation of Representative Districts so large that in one case one would, if it had been a Senatorial District, have been entitled to elect three Senators. Pursuance of the stated policy of having House Districts with smaller constituencies than Senate Districts would have indicated that the House Districts all be single-member.

[4] The District Court recognized this. (R. 75; 238 F. Supp., at 476) Indeed, over three-fourths of the Representative District boundaries do not coincide with census tract lines. (R. 222) This is not caused by any lack of census tracts to use as "building blocks." In Oahu alone there are 113. (R. 219)

The arbitrary choice was not a necessary one. It was entirely feasible to have provided single-member districts for the House.[5] Exhibits submitted by the plaintiffs clearly demonstrated this. (Plaintiffs' Exs. 6, 7, 8 and 9, R. 340-42)[6] And it would be feasible to follow census boundaries in apportionment—if conducted as part of a population-based system. (R. 273)

As we develop below, there are inequities in any system of multimember districting; peculiar inequities in a multimember system in which the number of members per district varies extensively from district to district; and further peculiar inequities in the Hawaii House system. In *Reynolds* v. *Sims,* 377 U. S. 533, 565 (1964), this Court stated: "The concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." In order to say that persons do not stand in the same relation, a rational distinction between them must be shown. *Reynolds* v. *Sims, supra,* 377 U. S., at 565-66, 578-81; see, *e.g., Skinner* v. *Oklahoma,* 316 U. S. 535 (1942); *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960).[7] The use of varying multimember districts in the

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[5] And to reapportion them shortly after the federal census on an expedited basis—about a week's work for a small staff. (R. 257-58)

[6] Plaintiffs' Exhibit 8, demonstrating a single-member House districting system for Oahu, is not printed in the Record, but by stipulation of the parties, nine copies thereof will be filed with the Clerk.

[7] In *Drew* v. *Scranton,* 229 F. Supp. 310 (M. D. Pa. 1964), *remanded on other grounds,* 379 U. S. 40 (1964), the District Court found that, among the larger Pennsylvania counties, fourteen were single-member districts, while fifteen others contained single-member and two-, three-, and four-member districts. The court held, "In the absence of any legislative history or other explanation justifying it, and we have found none, we can only conclude that this

Hawaii House, for the reasons we will develop further below, treats members of the population of Hawaii in different fashions. Since there is no rational basis, in terms of the creation and construction of the districts, for this disparity of treatment, we submit that it cannot be squared with the Equal Protection Clause.[8]

2. *Overrepresentation of the large, multimember districts.*—Once the arbitrariness of the construction of district lines—and thus of the choice of whether a district shall have one, two, three, four or six Representatives—is established, the impermissibility of the overvaluation of

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districting is either the result of gerrymandering for partisan advantage, as was suggested at the hearing, or that it is wholly arbitrary and capricious." *Id.*, at 326. Therefore, the districting violated the Equal Protection Clause.

In *Sincock* v. *Duffy*, 215 F. Supp. 169 (D. Del. 1963), *aff'd sub nom. Roman* v. *Sincock*, 377 U. S. 695 (1964), the court considered a plan in which two small counties were given one at-large senator each, in addition to the senators apportioned to their single-member districts. However, the third and largest county in the state received no at-large senator. The court found that inhabitants of small counties were thus represented by two senators while those of the large county were represented by one. The court held that this system was arbitrary, was adopted for the purposes of gerrymandering, and would violate the Equal Protection Clause even if senators were otherwise equally apportioned.

[8] In *Reynolds* v. *Sims*, 377 U. S. 533 (1964), this Court recognized that the arbitrariness of an apportionment scheme is a basis for holding it to be unconstitutional. The Court said, "Furthermore, the existing apportionment, and also to a lesser extent the apportionment under the Crawford-Webb Act, presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone." 377 U. S., at 568. It also said, "Indiscriminate districting . . . may be little more than an open invitation to partisan gerrymandering." 377 U. S., at 579. The construction of Representative Districts in Hawaii was arbitrary and indiscriminate particularly in terms of the relative sizes of the districts.

the representational strength of the person who happens to reside in a large, multimember district—or at least that of the majority in that district—becomes plain. While the citizen in a single-member district has but one representative to protect his interests, one in a six-member district has six. As a matter of political realism, a person in such a district has representational advantages over one in a single-member district. The majority in such a large district will tend to have an inordinate influence in the political life of the State.

To be sure, to some extent this is counterbalanced by the fact that the district is *pro tanto* larger. But the existence of this superior power cannot be denied as a matter of practical political realism. The reasons for this are the same as those which make it incumbent upon presidential candidates, in the nomination or general election stages, to concentrate on those states with the largest number of convention or electoral votes. While to be sure a measure of extra effort is required in campaigning in these states because of their greater population, the rewards are well worth it. Thus, the District Court well spoke of the large multimember districts as "monolithic political units." (R. 160; 240 F. Supp., at 729)—For example, one out of the eighteen House districts, with six Representatives, controls 12% of the House.

The effect of this overrepresentation for the large, multimember districts is accentuated when one remembers that in Hawaii the population of even the larger multimember House districts is still small in absolute terms, and the relationship between constituent and representative is apt to be direct and immediate. The four-member Representative Districts in the Hawaii Legislature, even on the

basis of 1964 registration, have only about 20,000 registered voters. (See p. 10, *supra*) Their population, in some cases, is as low as 36,000 or 40,000. Even the largest multimember district, the Fifteenth Representative District, had only 31,302 registered voters in 1964, and a 1960 population of only 60,125. This intensifies the degree of overrepresentation enjoyed by an individual in a large, multimember district; he has a greater number of representatives, yet they all stand in a substantially immediate relationship to him.

While the matter is necessarily speculative, it is instructive to remember that the bulk of the larger Representative Districts are on Oahu. The political representation of Oahu in the House is intensified through this factor. At the time that the House multimember districting scheme was adopted, a Senate was also adopted which gave political dominance to the other islands. Thus, although the overall scheme certainly could not be squared with *Reynolds* v. *Sims* and its companion cases, the overrepresentation of the Oahu multimember districts through the use of multimember districting may well have been intended as a counterbalance to the geographical representation provided in the Senate, and therefore might have been the less arbitrary on that account. Not only does this factor suggest the inseverability of the apportionment scheme for the two houses, as we have developed in subpart A, pp. 33-35, *supra,* but it indicates why, even following the District Court's approach of viewing each house as a single chamber, the House multimember districting scheme provides overrepresentation to the large, multimember districts and violates the Equal Protection Clause.

The Hawaii House system thus arbitrarily gives certain parts of the population of the State as many as six Representatives and other parts of the population only one

Representative. While there is equality of voting strength in the sense of the number of registered voters per Representative, there clearly is no equality of representation; and that inequality stands without rational justification.

As the District Court put it in *Drew* v. *Scranton*, 229 F. Supp. 310 (M. D. Pa. 1964), *remanded on other grounds*, 379 U. S. 40 (1964), absent a justification for a system of multimember districting:

> "[E]ach voter should participate in the selection of one of the representatives only. For since the persons elected are to comprise a boiled down reflection, as it were, of the larger electorate, and since each of them, therefore, in a very real sense stands in the assembly in the place of a group of voters, it would appear to interfere with and dilute the voting rights of others for a voter to participate in the election of more than one representative." *Id.*, at 326.

The District Court continued:

> "Certainly a voter in a four-member district will not only have four votes for representative, but he will also have four members of the House who will be especially concerned with his views and interests and amenable to his persuasion, since they will want the benefit of his suffrage for reelection. The voter in a single-member district, however, will have only one representative to look to express his views and espouse his interest." (*Id.*, at 327)[9]

The Hawaii House system of mixed, varying, multimember and single-member districts deprives the population in the single-member districts of equal representation,

[9] *Cf. Butcher* v. *Bloom*, 415 Pa. 438, 467, 203 A. 2d 556, 572-73 (1964).

and in the absence of rational justification is condemned by the Equal Protection Clause.[10]

3. *Denial of equal protection to minorities within the large, multimember districts.*—While the majority voice in a large, multimember legislative district speaks loudly, the minority voice may not speak at all.[11] While the Senate plan, rightly rejected by the District Court, certainly provided for a submergence of minorities, the existing House apportionment scheme does the same thing.

The Hawaii population is composed of extremely diverse groups, with diverse cultures, ancestry, language, interests and needs. They live together in a very limited amount of usable living space. Yet, as pointed out above, no consideration was given by the convention to social and economic factors in drafting Representative District lines. The

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[10] It does not appear that in *Dorsey* there was any challenge based on overrepresentation for the citizens in the large, multimember districts. The Court's opinion discusses only the contention that certain people within the multimember districts were, because of the arrangement in Georgia, discriminated against. The question of overrepresentation of the multimember districts does not appear to have been discussed.

[11] In our discussion of submergence of minorities, we do not suggest that racial discrimination accounts for the construction of the districts in Hawaii, nor do we urge that districts be constructed so as to give any seat to any person of a particular race. We have no quarrel whatsoever with the conclusion that the Equal Protection Clause "does not demand an alignment of districts to assure success at the polls of any race. No line may be drawn to prefer by race or color." *Mann* v. *Davis*, 245 F. Supp. 241, (E. D. Va. 1965), *aff'd sub nom. Burnette* v. *Davis*, Nos. 241, 424, O. T. 1965, October, 1965. It is not our position that district lines should be drawn to prefer any race. Our position is that Hawaii's districting system affirmatively discriminates against the right of all the people to equally fair and effective representation, minimizes and submerges minorities, and conduces toward election of legislators by less than a majority in each district, and therefore is in conflict with the Equal Protection Clause.

district lines drawn were completely arbitrary. The result is to submerge minorities. By the time of its last order in the case, the District Court had begun to realize this. Its April opinion indicated that the Fifteenth Representative District, with its six Representatives, was "too large," and observed that it amounted to a strange mixture of an area consisting of an extremely high percentage of professional and managerial people, in certain areas, and a high concentration of low-middle-income persons in another.[12] (R. 157-58; 240 F. Supp., at 728-29) This district elects 12% of the total members of the House of Representatives. The election of six members on a general ticket from a district of this nature is bound to overestimate the representation of those in the majority party or faction of the day and completely submerge the representation of the minority.

This case was tried (as to the multimember districting in the House)[13] before this Court's decision in *Fortson* v. *Dorsey*, which held that multimember districting was not to be condemned *per se*.[14] In the case of the Hawaii House multimember districts, extensive proofs were not put in as to the details of the submergence of minorities. Yet the existence of minorities in these districts is plain. We urge the Court not to permit the affirmative sanctioning of a rep-

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[12] This district, in fact, combines: The Waikiki resort area; the "central area," which contains operatives, laborers, clerical workers and middle and lower-middle-income people; the University of Hawaii area; and the "upper area," containing many upper-income professional and managerial people. (R. 269-72, 329)

[13] The trial of this issue took place January 11-13, 1965. (R. 193)

[14] To be sure, there were earlier dicta suggesting the propriety of some multimember districts in one house of a State legislature. *Reynolds* v. *Sims*, *supra*, 377 U. S., at 577, 579, quoted in *Dorsey*, 379 U. S., at 436.

resentation system with as much potential for the submergence of minorities as Hawaii's House apportionment, in view of the lack of any rational justification or basis for the entire construction of multimember districts in the House.[15] In the light of the affirmative findings of the District Court of the diversity of the population and the presence of minorities in the larger multimember districts (R. 156-59; 240 F. Supp., at 727-29), of the need for identifiable constituencies (R. 158, 161; 240 F. Supp., at 729-30), and of the submergence of minority groups (R. 162 n. 5; 240 F. Supp., at 731 n. 5), and the absence of any rational basis for the drawing of the districts, this Court should not sustain the District Court's affirmative approval of the multimember districting scheme in the House.

The interest against which these multimember districts offend was well described in the debates leading up to the

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[15] *Burnette* v. *Davis*, Nos. 241, 424, O. T. 1965, October 25, 1965, *affirming Mann* v. *Davis*, 245 F. Supp. 241 (E. D. Va. 1965), is not to the contrary. There the District Court found that the two areas were unified socially, geographically and politically, and that the district was not so large "as to demand the establishment of identifiable constituencies." Also, the District Court suggested that because the other house of the Virginia Legislature was constructed purely on the basis of single-member districts, any minorities allegedly submerged would be adequately represented there. 245 F. Supp., at 244. On the contrary, in Hawaii, the original Legislature and the Legislature contemplated by the provisional Senate plan put forward in April 1965, are both composed of two multimember chambers.

The present case deals with a purely arbitrary system of districts, both in terms of boundaries and respective sizes. The District Court found that the areas within the Representative Districts were not unified socially, (R. 156-58; 240 F. Supp., at 727-29) while the District Court in *Burnette* affirmatively found such unity. (245 F. Supp., at 244) Moreover, the districts here, one of which elects as much as 12% of the House of Representatives, and many of which elect 8% thereof, are so large in terms of the overall size of the legislative body that they demand the establishment of identifiable constituencies.

1842 statute[16] which established the principle, followed ever since, that single-member districts be employed in the election of representatives for the Federal House of Representatives. It was then observed:

> "The general-ticket [multimember] system disfranchises the minority in a State, however near it may approach to a majority, and in however so many districts it would actually constitute a majority, and be entitled to a representation in Congress. Sir, what do we know of the minority in Missouri, or Alabama, or New Hampshire? Its voice is never heard in this hall; its vote is never counted. It is subjected to laws it has no agency in making, and to taxes which it has no representative agency in imposing, . . . It is true, a choice by districts has its minorities; but what is lost in one district, may be gained in another; and thus, as far as can be, an equality of representation is preserved of all the people, and a just proportion of relative power is secured to all the States."
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> "Next in importance to the right of representation, is to make that representation equal and efficient to all who are entitled to its enjoyment. The single districts will effectually secure this result. Each separate interest I have named will have its equal share of representation. The agricultural, the manufacturing, the mechanical, and the commercial districts, may each have the member of their choice to represent their peculiar interest. Thus, while we secure a Representative to every local interest, we at the same time prevent all sectional combinations, and give to the people of every class a useful, a responsible, and an equal rep-

[16] 5 Stat. 491 (1842).

resentation in Congress." 1841-42 Cong. Globe, app., pp. 793-94, 796.

Absent some rational basis supporting a contrary result, the systematic failure of a state to afford representation to the minority cannot, we submit, be squared with the Equal Protection Clause. An arrangement like that of the Hawaii House tends to submerge minority views not only in the multimember districts themselves but in the Legislature as a whole. The foundation of representative government is that the Legislature constitutes a microcosm of the State, giving reflection to the needs, desires and views of all its elements. While such a microcosm cannot be inevitably guaranteed under a representative form of government, certainly any system which on an arbitrary basis prevents its occurrence should not be permitted to stand.

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There are other vices inherent in the multimember district system employed in Hawaii. On the "general ticket" basis on which the candidates run, individual candidates are often elected by a vote of less than the majority of those voting. In the massive Fifteenth Representative District on Oahu, where six Representatives are elected, four of the winners in the 1964 general election received less than a majority vote, one receiving only 44% of the poll. Similarly, in the Third Senatorial District (Maui), where two long-term Senators were to be elected in 1964, both were elected with less than a majority of the votes cast. Three of the four Representatives in the Seventh Representative District (Maui) were similarly elected by less than a majority; and other instances of election by less than a majority were presented in that election. (Governor's Ex. GO-4 (unprinted portion) (fol. 974-75, pp. 5, 7, 8))

In a single-member district, the winner of the election, assuming a two-candidate race, will have a majority of the

votes cast. As indicated, this is not necessarily the case in a multimember district; and the likelihood of election by less than a majority would appear to increase as the number of members to be elected increases. The failure of voters to vote for a full slate in a multimember district may be caused by a variety of factors, such as lack of interest in the full slate of candidates, or lack of familiarity with or identification with the full slate; or resort to the questionable practice of "block voting" in the belief that this is the only way in which a minority may make its voice heard in a multimember district. The principle of majority rule within a district, which underlies the "one-man, one-vote" rulings of this Court, is a basic one. Hawaii's multimember districting system subverts this principle; on this basis, taken with the other infirmities we have referred to, it cannot be squared with the Equal Protection Clause.[17]

D. The District Court Erred With Respect to Various Matters Relating to Remedies.

We submit that a number of the rulings of the District Court, embodied in its February 17 order and reaffirmed in its April 28 order, improperly foreclosed certain avenues from which a proper reapportionment scheme might come,

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[17] The debates leading to the enactment of the 1842 Congressional statute providing for single-member districts in the House of Representatives contains a cogent observation by Senator Miller of New Jersey which makes the point we develop in the text:

> "The single [member] district system will also put an end to all the petty contrivances, those caucus combinations by which unworthy candidates too frequently procure themselves to be placed upon a general ticket. We have all seen and felt the effects of this odious practice. Men, who could not command a hundred votes when standing alone upon their own merits, have, with the aid of a few active and zealous personal friends, contrived to get themselves upon a party ticket, along with more popular and worthy candidates; thus uniting the good with the bad, and then, by means of party discipline, riding triumphantly into power against the honest wishes of the very people who voted for them. But, if we elect by single

were unduly coercive under the circumstances in which they were rendered, or were otherwise erroneous.

1. *The foreclosure of provisional reapportionment.*— Initially, the District Court expressly held in its February 17 opinion that the Hawaii Legislature lacked the power to reapportion the Senate pending the adoption of a valid constitutional amendment. (R. 78; 238 F. Supp., at 478) While it apparently departed from this holding in its March order permitting the Legislature to propose a provisional plan, the Court, by reinstating the February order in its April 28 order upon its rejection of the provisional Senate plan proposed by the Legislature, apparently reaffirmed its earlier ruling that a provisional plan could not be adopted by the Legislature. (R. 164; 240 F. Supp., at 732) Although, as we will develop in subpart B of Part II, the District Court certainly has special powers with respect to any provisional plan adopted by the Legislature, it was error for the District Court to hold that the Legislature lacked any power to adopt a provisional plan. This error of the District Court led it to impose the extraordinarily tight time schedule that there be a permanent constitutional amendment put into effect before the 1966 general elections. (R. 80-81; 238 F. Supp., at 479)

The holding of the District Court flies in the face of *Maryland Committee* v. *Tawes,* 377 U. S. 656 (1964). There, the Maryland Court of Appeals held that if the apportionment provisions of the Maryland constitution were invalid, the General Assembly was empowered to enact a bill reap-

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districts, every candidate must stand or fall upon his own individual character; he can borrow no influence from his fellow-candidates, no support from combinations with others. He must fight upon his own hook, and therefore will not venture into the canvass, unless he has merits to recommend him to the confidence of the people of the district where he resides. . . . " 1841-42 Cong. Globe, app., p. 790.

portioning its membership.[1] It stated that with the apportionment provisions of the constitution invalidated, the powers of the legislature were plenary and not limited by constitutional provisions as to apportionment.

The proposition was affirmed by this Court:

> "With the Maryland constitutional provisions relating to legislative apportionment hereby held unconstitutional, the Maryland Legislature presumably has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions relating to legislative apportionment which comport with federal constitutional requirements." 377 U. S., at 675-76.

The Hawaii Constitution, like that of Maryland, confers broad powers on the legislature. Article III, Section 1 provides:

> "The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States." [2]

The invalidity of the apportionment provisions of the State Constitution and resultant lack of applicable consti-

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[1] *Maryland Committee* v. *Tawes,* 228 Md. 412, 438-39, 180 A. 2d 656, 670 (1962).

[2] The constitutional convention which drafted Section 1 intended this grant of legislative powers to be as broad as possible. "The legislative power is extended to 'all rightful subjects of legislation . . .' which phrase is intended as the broadest possible grant. Unlike Section 55 of the Organic Act, from the first sentence of which said phrase is derived, and the constitutions of many of the states, the restrictions on the legislative power are not to be found in this article but, if at all, in other parts of the Constitution." (R. 345)

tutional provisions, plus the provisions conferring plenary "legislative" powers over all "rightful subjects of legislation" on the Hawaii Legislature, provide that Legislature, as a matter of federal law, with authority to reapportion at least temporarily.[3] This Court has made clear that the federal judiciary may, as a matter of federal law, reapportion if necessary to prevent denial of constitutional rights. *Reynolds* v. *Sims,* 377 U. S. 533, 586-87 (1964); *cf. Travia* v. *Lomenzo,* No. 633, O. T. 1965 (decided Dec. 13, 1965). It would be a strange holding that the power of the legislative body of a state would be any less, at least where the State Constitution vests plenary law-making powers in it. After all, "primary responsibility for legislative apportionment rests with the legislature itself," *Maryland Committee* v. *Tawes, supra,* at 676, and "reapportionment . . . [is] basically a legislative function." *Roman* v. *Sincock,* 377 U. S. 695, 702 (1964). *Cf. Reynolds* v. *Sims, supra,* 377 U. S., at 586; *Davis* v. *Mann, supra,* 377 U. S., at 693.

Thus, we contend, the Legislature has the power to reapportion the Senate on an interim basis. Moreover, since, as we have developed in subparts A, B, and C above, the apportionment of the House cannot be held to be constitutional, the power of the Legislature to adopt an interim reapportionment plan would extend to both houses.

The District Court's holding to the contrary was apparently based on *Guntert* v. *Richardson,* 47 Haw. 662, 394 P. 2d 444 (1964). It is clear that the reliance was an erroneous one.

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[3] See also, *Sincock* v. *Duffy,* 215 F. Supp. 169, 191 (D. Del. 1963), *aff'd sub nom. Roman* v. *Sincock,* 377 U. S. 695 (1964), where the court stated that with the Delaware constitutional provisions relating to legislative reapportionment declared invalid, the Delaware legislature could "then proceed to pass an apportionment statute meeting the requirements of the Fourteenth Amendment . . . ." See 377 U. S., at 710-11.

Guntert was an original action submitted to the Supreme Court of Hawaii upon an agreed statement of facts in July, 1964. The plaintiffs in that suit sought to enjoin the conduct of any further elections of members of the Legislature under existing apportionment law on substantially the same grounds alleged by the plaintiffs in this proceeding. The hearing was directed essentially to the question whether the Supreme Court should enjoin the 1964 elections.

The court said that although it could assume the invalidity of the composition of the State Legislature in whole or in part, it would not interfere with the 1964 elections. *Cf. Reynolds* v. *Sims, supra,* at 585. Decision on all other matters was held in abeyance.[4]

The Hawaii Supreme Court did observe in dictum that, although the provision of the Hawaii Constitution to the effect that any constitutional amendment altering the basis of representation in the Senate required the approval of a majority of the votes upon the question in at least a majority of the counties of the State, was in itself unconstitutional, this fact did not "render invalid the requirement that the change [in the composition of the Senate] be by constitutional amendment." 47 Haw., at 668; 394 P. 2d, at 448. However, the Hawaii court expressly stated that, inasmuch as the matter of reapportionment was still in its early stages—the court's opinion was rendered the month after this Court's reapportionment decisions of June 1964—it was viewing the problem as merely one "of local law, not federal constitutional right." 47 Haw., at 667; 394 P. 2d, at 447. It indicated that under other circumstances, such as litigation pending for a more protracted

[4] Thereafter, the case was dismissed by stipulation of the parties.

period, considerations of the speedy effectuation of federal rights would also have to be taken into account. *Ibid.* See *Roman* v. *Sincock, supra,* at 711-12; *Maryland Committee* v. *Tawes, supra,* at 674.

And, most significantly, the Hawaii court made it perfectly plain that its dictum referred simply to a permanent plan of reapportionment and not to an interim reapportionment plan. The court's opinion, as to a temporary reapportionment plan, indicated clearly that it was of the view that both the judiciary and the State Legislature could adopt a temporary plan. The court, however, held that, on balance, no such effort needed to be made before the 1964 elections.[5]

The short of the matter is that not only did the Hawaii Supreme Court fail to deny the existence of legislative power in Hawaii to reapportion even on a permanent basis, but that it expressly recognized the Legislature's power to reapportion on a temporary basis.

2. *The order that a permanent reapportionment plan be put into effect before the 1966 general elections.*—The District Court's order of February 17, 1965, required that a constitutional convention be convened not later than October 15, 1965, and that amendments to the Hawaii Constitution proposed by the convention be submitted to the electorate at a special election to be held not later than January 30, 1966. In temporarily suspending that order through its March order, the District Court permitted the Legislature to propose a constitutional amendment but man-

[5] "We would not enjoin the holding of the 1964 elections under the existing apportionment unless prepared to supply a temporary reapportionment plan, if the legislature should not do so . . . ." 47 Haw., at 671, 394 P. 2d, at 449.

dated that it be submitted for popular ratification not later than at the November 1966 general election.[6] (R. 89-90) While, because of the stay of the coercive provisions of the District Court's order and the passage of time, the provisions as to a Fall 1965 constitutional convention have become moot, the District Court still has indicated that a permanent system of reapportionment must be put into effect by the November 1966 general elections, and presumably will implement this view on any remand of this case in the absence of a contrary ruling from this Court.

We submit that—presumably because of its belief that the Legislature had no power to adopt a provisional reapportionment plan—the District Court erred in ordering a permanent plan to be in effect by November 1966, and that this Court, on remand to the District Court, should make it clear that—particularly in view of the passage of time—this schedule should not be imposed in terms of a permanent plan.[7]

The Governor is definitely in accord with the basic wish of the District Court that the 1966 elections be conducted on a properly apportioned basis. His contention is that the Court erred in requiring this schedule in terms of a permanent plan. The parties' rights can adequately be protected, and a more orderly transition to a fair permanent plan take place, if the deadline for a permanent plan were deferred somewhat, and a provisional plan were adopted, either by the Legislature or the Court itself, to provide for

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[6] The order of April 28, 1965, withdrew that amendment and restored the original order. (R. 164; 240 F. Supp., at 732)

[7] Even if we are in error in our contention that the Hawaii Legislature has the power to provide a provisional reapportionment plan, it is indisputable that the District Court has the power to promulgate an interim plan on its own authority. *Reynolds* v. *Sims*, 377 U. S. 533, 586-87 (1964).

fair apportionment of the Legislature to be elected at the 1966 general election.—None of this Court's reapportionment decisions mandates or warrants the stringent time schedule imposed by the court below in terms of a *permanent* plan.

3. *The order requiring that a constitutional convention, rather than the Legislature, propose the permanent reapportionment amendment.*—Moreover, with a similar inflexibility, the District Court foreclosed one of the two methods provided in the Hawaii Constitution for the adoption of a permanent constitutional amendment providing for reapportionment. The Hawaii Constitution provides that constitutional amendments may be proposed to the electorate either (1) by a constitutional convention, or (2) by a two-thirds vote of each house of the Legislature at one session, or by a majority vote of each house of the Legislature at two successive regular sessions. Hawaii Const., Art. XV, Sections 2 and 3.

Presumably this ruling was caused by the court's failure to recognize the possibility of provisional reapportionment, which would result in a properly constituted Legislature which could propose a sound constitutional amendment through the legislative rather than the convention route. We know of no authority, and the District Court cited none, to the effect that it had the power to foreclose one of the methods, valid on its face, provided in the Constitution for the adoption of a permanent constitutional amendment providing for reapportionment.[8] In any event,

[8] We, of course, have no quarrel with the District Court's invalidation of that part of Article XV, Section 2, which provides that a constitutional amendment changing the apportionment in the Senate must be adopted by a majority of the electorate in each of a majority of the counties. But certainly the invalidity of that provision would not affect the validity of the two alternative means of *proposing* a constitutional amendment to the electorate set forth in Section 1 of the Article.

it would be more consonant with equitable considerations to permit the State to determine whether it should take the legislative or the convention path in proposing a permanent constitutional amendment, since, if an interim plan had been put into effect, justice would not be delayed.

4. *The order putting on a purely permissive basis a proper apportionment in the constitutional convention.*— In ordering the Legislature to provide for the calling of a constitutional convention, the District Court required the enactment of legislation providing for a special election to elect delegates to the convention "in the manner provided in the Constitution. Such legislation *may* include legislative action under Article XV, Section 2, 4th paragraph, of the Constitution." (R. 80; 238 F. Supp., at 479) (Emphasis supplied) That provision states that "unless the legislature shall otherwise provide, there shall be the same number of delegates to such convention, who shall be elected from the same areas . . . as required for the Hawaii State Constitutional Convention of 1950." The election of delegates to the convention of 1950 was conducted pursuant to Act 334, Session Laws of Hawaii 1949, which apportioned 63 seats among six representative districts. This Act allocated representation on a basis other than that of population.[9] Thus the District Court's order permits apportionment of the constitutional convention on a basis on which a State Legislature could not itself be validly apportioned.

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[9] The Act is set forth in Appendix A, p. 25a, *infra*. It distributed the delegates among the Representative Districts established under the Organic Act of 1900. See note 22, pp. 59-60, *supra*. Only thirty-six of the sixty-three delegates are allotted to Oahu through the formula provided in the Act, which is substantially inadequate either in terms of population or of registered voters. See p. 6, *supra*.

Whether or not the District Court was correct in making the constitutional convention route the only one by which a permanent reapportionment amendment might be proposed, we submit that its failure to order that any convention called to consider such an amendment be apportioned on a population basis was erroneous. *Cf. Maryland Committee* v. *Tawes, supra,* at 670; *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 631, 652 (1964). A constitutional convention is a law-making body, responsible for framing or amending the basic, organic law of the state; its apportionment should certainly be tested by the same constitutional standards as that of a legislature. The organization of a constitutional convention on a malapportioned basis would hardly be an auspicious first step toward a permanent plan of proper legislative apportionment.[10]

Indeed, the District Court's mandate against legislative proposal of a constitutional amendment, and in favor of proposal through a convention, albeit a convention which might be malapportioned, could well produce paradoxical results. If, as we contend proper, an appropriate provisional plan of reapportionment were adopted and the 1966 general election held under it, the result should be a Legislature more properly apportioned than the convention provided for by the Hawaii Constitution. Yet, under the District Court's approach, initiation of the permanent constitutional amendment could not be made by the Legislature so apportioned but would be required to be made by the convention!

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[10] Clearly it is a different matter from saying that a malapportioned Legislature may itself legally adopt a reapportionment plan, if that plan were itself constitutional, to say that an entirely new legislative organ of government—a constitutional convention—should be permitted to be formed on a malapportioned basis.

5. *In view of the timing of its action, the District Court abused its discretion in imposing an injunction against legislation pending the adoption of a proper reapportionment plan.*—The District Court, on the 58th day of a 60-day legislative session, with all the basic legislation necessary for the orderly maintenance of the State's Government pending enactment (R. 170-176), abused its discretion in imposing an injunction against final adoption of general legislation until legislation looking toward reapportionment was adopted.[11] (R. 80, 164)—The immediate effects of this injunction were dissipated by the stay order which Mr. Justice Douglas signed on May 21, 1965.

It is unclear whether the coercive provisions of the District Court's order will run against the regular session of the Third State Legislature to be held commencing in February 1966, upon remand to the District Court following whatever disposition this Court makes of the substantive aspects of this litigation. The pertinent provisions of the order recited that: "This court will not interfere with the convening or conducting of the business of the Third State Legislature in regular session in 1965, save and except that the parties herein are hereby enjoined from taking final action upon any legislation . . . ." (R. 80; 238 F. Supp., at 479) It is not clear to what extent the injunctive terms of the order are limited by the reference to the 1965 session. Of course, in the event of the reversal of any part of the District Court's order of February 1965, presumably the District Court would reconsider its provisions as to remedies; and it might also do so if this Court should agree with

[11] Since the April 28, 1965, order abandoned any prospect of a provisional plan, its requirement on the Legislature was that it adopt legislation looking toward the calling of a constitutional convention.

us as to any of the contentions which we make in the earlier points of this subpart D as to remedies.

In any event, while the Governor did not take the point of view below that an injunction against legislation was *per se* an arbitrary and impermissible remedial measure, his position is that it may well become so if precipitately imposed at certain stages in the legislative session, as was the case in the 1965 session through the reimposition of the injunction on the 58th day of a 60-day regular session. While it is obviously impossible to forecast at what stage of the legislative session this case might be remanded to the District Court,[12] we respectfully suggest to the Court that it might be appropriate that its opinion disapprove any reimposition of such an injunction at a time when it would threaten the severe interference with the machinery of the state government which it did at the 1965 session. *Cf. Fortson* v. *Toombs,* 379 U. S. 621, 622 (1965).

II. THE DISTRICT COURT'S APRIL ORDER CORRECTLY DECLINED TO APPROVE THE LEGISLATURE'S PROPOSED REAPPORTIONMENT PLAN FOR THE SENATE

In its opinion and order of April 28, 1965, the District Court declined to approve a plan drawn by the Legislature to reapportion the Senate. In this part, on behalf of the Governor as appellee in Nos. 323 and 409, we defend this action of the court below.—The Legislature's Senate plan, in essence, took the form of two bills, a provisional reapportionment plan (H.B. 987, R. 113), and a constitutional amendment proposal (H.B. 773, R. 140). However, since the constitutional amendment proposal, which was in terms

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[12] The 1966 session will be a 30-day "budget session," commencing February 16, 1966. (The computation of days in a session excludes Sundays and holidays.) Hawaii Const., Art. III, § 11.

substantially similar to the provisional plan, did not pass the Legislature by a two-thirds majority in both houses, it could not amount to a valid constitutional amendment proposal until repassed at the next regular legislative session, a speculative possibility.[1]

The Legislature's Senate plan used the "registered voters" measure of representation. While (consistently with its approval of that method in the House) the District Court did not reject the plan on that basis, for the reasons stated in subpart B of Part I, pp. 42-70, *supra*, we urge that the Legislature's Senate plan could not be squared with the Equal Protection Clause for that reason, and that accordingly on that ground the District Court's order rejecting the plan should be affirmed.[2]

Moreover, the District Court was justified in rejecting the Senate plan on the basis of its use of arbitrary, multimember districts. The multimember districting system in the proposed Senate plan had, if anything, more weaknesses than the House multimember districting system and, of course, intensified the discriminations inherent in the House system. In any event, the District Court's order under which the Legislature acted provided that the Senate plan be submitted "to this court for approval" (R. 90), and H.B. 987, the provisional reapportionment legislation, the only one truly before the court, expressly stated that it would take effect only "upon approval . . . by the United States District Court for the District of Hawaii." (R. 117) Even if the deficiencies in the Legislature's pro-

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[1] The speculative nature of this possibility is accentuated by the fact that the bill passed the Senate only by a 13 to 12 vote. (R. 164)

[2] We develop some of the specifics of the discrepancies caused by the use of the "registered voters" measure in the Senate plan at pp. 71, 81, *supra*.

visional Senate plan did not rise to the level of a violation of the Constitution, the District Court, in view of the powers it had to fashion a remedy for the previous malapportionment by sanctioning a provisional plan, acted within its discretion in rejecting the Legislature's plan.

A. The Proposed Senate Plan's Arbitrary Construction of Multimember Districts Violated the Equal Protection Clause.

1. As developed in the Statement, pp. 17-18, *supra*, the proposed Senate plan constructed eight Senate districts among which 25 Senators were distributed.[3] Only one of the districts was a single-member district; one was a two-member district; two were three-member districts; and the remaining four (all on Oahu) were four-member districts. Citing the legislative history of the measure, the District Court found that the proposed Senate Districts were constructed basically by using existing Representative District boundaries. (R. 156, 160-61; 240 F. Supp., at 727-28, 730) Although the District Court recited that it had held the districting of the House to be constitutional, it observed that the Senate plan, instead of correcting the representational problems inherent in the House system, magnified them. It observed that one of the House districts was "too large" and that the result of imposition of the proposed Senatorial

[3] As we have indicated before (pp. 36-37; 39-40, *supra*), the District Court's order tended to freeze the number of Senators at 25. On a population basis, approximately 19 of these 25 Senators would have to come from Oahu. The effects of the Legislature's provisional Senate plan, in terms of the creation of large, multimember districts, were worst on Oahu, although the Legislature also turned the whole of the County of Hawaii into one multimember district in order to carry out what the District Court found to be a plan to protect incumbent Senators. (R. 163; 240 F. Supp., at 731) The consequences on Oahu are a vivid illustration, once again, of the inseverability of the whole of a scheme of legislative apportionment.

districts, which were larger than the Representative districts, was to create "monolithic political units." (R. 158, 160; 240 F. Supp., at 729-30)

The Court declined to find any rational basis for the construction of the Senatorial districts other than the use of the boundaries of the Representative districts.—As we have observed, these boundaries, in turn, are completely arbitrary. Indeed, on the basis of substantial evidence in the record (R. 302-03, 308-09, 311), the District Court affirmatively found that the use of multimember districts in the Senate was impelled by the desire of incumbent legislators to save their seats.[4] (R. 163; 240 F. Supp., at 731)

This arbitrariness, found by the District Court, when taken with the inevitable inequalities in representational power inherent in a variable multimember districting scheme (pp. 76-84, *supra*), amply supports the District Court's conclusion rejecting the plan. Indeed, four of the proposed Senate districts were each to elect 17% of the Senate; the District Court found that this would create "monoliths" effectively discriminating against persons in single-member and two-member districts. (R. 159-61; 240 F. Supp., at 729-30)

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[4] This was vividly illustrated in the situation in the County of Hawaii. There had historically been two Senatorial districts in this county. The tentative plan for Senate reapportionment proposed in March maintained this two-district system, allotting two Senators to East Hawaii and one Senator to West Hawaii. The April plan turned the County of Hawaii into a single, three-member Senate district. The Court found that the purpose was to protect seats of certain East Hawaii incumbents. (R. 163; 240 F. Supp., at 731)

As this Court indicated in *Reynolds* v. *Sims*, 377 U. S. 533, 581 (1964), arbitrary districting is an invitation to gerrymandering. District Courts have found gerrymandering to be the purpose of arbitrary districting schemes. *E.g.*, *Drew* v. *Scranton*, 229 F. Supp. 310, 326 (M. D. Pa. 1963), *remanded on other grounds*, 379 U. S. 40 (1964); *Sincock* v. *Duffy*, 215 F. Supp. 169, 188-89 (D. Del. 1963), *aff'd sub nom. Roman* v. *Sincock*, 377 U. S. 695 (1964).

Moreover, as the District Court also found, the effect of the Senate plan was to submerge minorities. The District Court pointed out the heterogeneity of some of the Representative Districts, intensified when separate districts containing diverse populations were combined by the Legislature to form Senatorial Districts. For instance, the proposed Fifth Senatorial District consisted of an area with a multitude of wealthy Caucasian widows and an area with a predominance of low-income Filipino males. The Seventh Senatorial District included "two clearly defined and geographically, economically and socially divided groups"—(1) "lower socioeconomic laborers" with a median family income of $3,000 in 1959; and (2) a group of "the highly professional and managerial class" with a median family income in 1959 of almost $16,000. (R. 158; 240 F. Supp., at 729)

The Court found that the Legislature had not considered equality of population among the districts or socioeconomic divergence within districts in creating the multimember districting plan. (R. 156; 240 F. Supp., at 727-28) It found that minority groups within some of the multimember districts would be effectively submerged by the plan and that persons in single-member districts would have less effective representation than those in monolithic multimember districts. (R. 158-61; 240 F. Supp., at 729-30)

2. The effect of the Senate plan, as the District Court rightly observed, was to intensify the problems inherent in the House plan. Even if the Senate plan could possibly have been appropriate for a unicameral legislature, it could not be considered appropriate as a second chamber to a House of Representatives apportioned as is Hawaii's, as

the District Court rightly concluded.[5] Indeed, this Court has never approved, even in dictum, a legislative apportionment scheme in which both houses of a legislature were districted on a multimember basis.[6]

Thus, the use of large, multimember districts in both houses compounds the problem of overrepresentation of those multimember districts. *Cf. Lucas* v. *Forty-Fourth General Assembly,* 377 U. S. 713, 735 (1964). Indeed, in two notorious cases recited by the District Court, a large, multimember Senate district was directly superimposed on a large, multimember House district in Oahu. Thus, the boundaries of the proposed Third Senatorial District and the Eighth Representative District were one and the same, and the district was to elect four Representatives and three Senators. The Sixth Senatorial District, as the District Court found, was constructed almost entirely from the Fifteenth Representative District, and, accordingly, the Fifteenth Representative District would dominate in the election of six Representatives and four Senators, on a general ticket basis, or approximately 13% overall of both chambers of the Legislature.

Moreover, a bicameral legislative scheme based solely on multimember districts might well be held to be uncon-

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[5] It is interesting to note that in its April 28 opinion the District Court recognized the proposition, taught by *Tawes,* that the constitutionality of one chamber of a bicameral legislature cannot be fairly considered in a vacuum, apart from the system of the other chamber. As we urge in subpart A of Part I, this was a reason why the District Court should never have affirmatively upheld the constitutionality of the House.

[6] In fact, in *Mann* v. *Davis,* 245 F. Supp. 241 (E. D. Va. 1965), *aff'd sub nom. Burnette* v. *Davis,* Nos. 241, 424, O. T. 1965, October 25, 1965, it was indicated that any inequities caused by a multimember districting system might be offset by a different districting scheme in the other legislative house.

stitutional *per se* because of the fact that it precludes the possibility of any minority representation within the legislative scheme. In a bicameral system with only one multi-member house, minorities may have some hope of representation in the other house. They have no such hope in a legislature both houses of which are elected from multi-member districts.

Such is certainly the case under the proposed Senate plan. As the court below found, districting under that plan was dependent on the previously existing Representative District boundaries. Thus, as developed above, the boundaries of two of the eight proposed Senate districts (both on Oahu) are coterminous, or nearly coterminous, with those of single Representative Districts. Other proposed Senatorial Districts were nearly coterminous with two or more Representative Districts. (R. 300-01)

The District Court held that not only was the proposed Senate districting arbitrary, as is pointed out above, but that the discrimination against minority groups in the multimember districts which is inherent in the House scheme would be intensified intolerably by apportioning members of both houses among the same or similar districts. Minorities within the Third and Sixth Senatorial Districts would never have an opportunity to be represented at all within Hawaii's Legislature. They would be effectively deprived of any voice in the choice of legislators. (R. 159-61; 240 F. Supp., at 729-30)

The Court thus correctly held that the proposed Senate scheme had to be considered in the light of the existing House plan. Moreover, the Court was correct in insisting that the two houses of a bicameral legislature must complement one another, by compensating for inequalities of representation inherent in the apportionment plan of the other,

and must not instead intensify existing inequalities. The Court well said:

> "There can be no truly representative government without a system of apportionment which provides potentially equal representation to the divergent factors incorporated within the body politic. Our own representative form of government demands checks and balances, devices and procedures to channel the many and diverse interests of the people into the making of a stream of legislation that produces for each person in that state the maximum beneficence possible.
>
> "In reapportioning and redistricting the senate, both houses overlooked the fact that, to be valid, the makeup of the senate must positively complement the makeup of the house, to provide the vital equality of voter representation. Both houses of the legislature seemingly forgot that the schemes of districting *each* house, when conjoined, must offer compensating advantages to the voters—not only to those voters within each representative district, be it senate or house, but to all voters throughout the State. While there perforce must be some overlap of representation with the several senate and house districts, that overlap must not be such as to concentrate and intensify the voting power of a single senatorial-representative district to the point that the voters therein have a built-in disproportionate representational advantage over any other voters of the State." (R. 158-59; 240 F. Supp., at 729)

The lack of complementary factors may result in invidious discriminations, not obvious when the apportionment of only one of the houses is improperly viewed in a vacuum, by intensifying discriminations inherent in single-

house apportionment. The District Court properly found that the conjunction of the existing House districting and the proposed Senate districting did result in invidious discrimination.

B. Even if the Provisional Senate Plan Had Not Been Violative of the Fourteenth Amendment, the District Court's Refusal to Approve It Should Be Sustained.

Even if multimember districting schemes, and the Hawaii scheme in particular, were not violative of the Fourteenth Amendment, they would be hardly appropriate in terms of affording proper representation. They denigrate the principle of majority rule, the theory that a constituency should be able to maintain effective control over its representative, and the ideal of a legislature as a microcosm of the society, reflecting its range of views and interests. Moreover, they create administrative difficulties, including numerous candidates and long ballots, which tend to hinder informed and efficient selection of representatives.[7]

As we have noted, the order of the District Court under which the Legislature's provisional plan for the Senate was submitted required that that plan be "approved" by the District Court, and the Legislature's Senate provisional plan provided that it should not go into effect without that approval.[8]—The Legislature's provisional plan for the

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[7] This Court has referred to a multimember districting scheme as "an extremely objectionable feature" of an apportionment plan. *Lucas* v. *Forty-Fourth General Assembly*, 377 U. S. 713, 726 n. 13, 731-32 (1964).

[8] The permanent plan proposed as a constitutional amendment by H. B. 773 contained no such provision. However, that House bill was insufficient to propose the constitutional amendment, inasmuch as it had not passed the Legislature by a two-thirds vote. Hawaii Const., Art. XV, Section 3. Although it had rejected the provisional plan contained in H. B. 987, the District Court declared

Senate, of course, was one which had had to win the approval of the very Senate which the District Court had held to be improperly constituted.

The District Court's disapproval, on the grounds stated in its opinion, is sustainable even if those grounds do not constitute a violation of the Fourteenth Amendment. The District Court has a broad power to fashion a remedy for previous unconstitutional state action. In *Fortson* v. *Toombs*, 379 U. S. 621 (1965), this Court stressed the "wide range" of discretion possessed by a district court in fashioning decrees to remedy malapportionment. The District Court could have fashioned and executed a reapportionment of the Senate itself, although it acted wisely in deferring doing so until plans had been submitted to it by the Legislature;[9] if it had not deferred, the court would have had to make determinations not dictated by the Constitution.

But in any approach, it was the court's duty to guarantee equality as well as it could in order to dissipate the effects of the previous malapportionment.[10] Indeed, the District Court had a duty to scrutinize with particular care the provisional plan proposed by the Legislature—containing as one chamber the very Senate which had been held improperly constituted—to see that the plan did not, for that reason, enshrine the results of the prior unconstitutional organization of the Senate.

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that "we . . . do not find it necessary to consider the validity" of H. B. 773. (R. 164-65; 240 F. Supp., at 742)

[9] See *e.g.*, *Davis* v. *Mann*, 377 U. S. 678, 693 (1964); *Reynolds* v. *Sims*, 377 U. S. 533, 586 (1964).

[10] On the powers of courts of equity completely and broadly to remedy the results of illegal action, see *e.g.*, *United States* v. *First Nat'l City Bank*, 379 U. S. 378 (1965); *May Department Stores Co.* v. *NLRB*, 326 U. S. 376, 390-91 (1946).

The Court could have adopted or rejected a plan offered to it by a private party, or could have adopted its own plan, as we have developed. That the provisional plan was drawn up by the Legislature and approved by majority vote in no way limits the Court's power to remedy the existing malapportionment by requiring a greater equality of representation than the minimal constitutional standards require. This is particularly the case when one of the methods provided in the Hawaii Constitution for the constitutional amendment which presumably would provide a permanent reapportionment plan is initiation by the Legislature. Certainly a Legislature elected under a provisional plan which might initiate such a constitutional amendment should be elected under a system which thoroughly dissipated the effects of the prior malapportionment.[11]

CONCLUSION

For the reasons stated, paragraphs 1, 2, 3 and 4 of the decision and order of the District Court dated February 17, 1965, should be reversed, except insofar as they invalidated the provisions of Article III, Section 2, of the Hawaii State Constitution fixing the number of Senators per Senatorial district and the provisions of Article XV, Section 2, of that Constitution pertaining to constitutional amendments affecting representation in the Senate; and the deci-

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[11] We recognize that this element could not have entered into the District Court's thinking because it precluded—as we contend erroneously—the legislative initiation of a constitutional amendment. (See subpart D, part I, pp. 86-90, *supra.*) Nonetheless, we submit that this is an appropriate matter for this Court to consider on review of the District Court's rejection of the Senate plan.

sion and order of the District Court dated April 28, 1965, insofar as it rejected the Legislature's proposed Senate plan, should be affirmed.

Respectfully submitted,

BERT T. KOBAYASHI
Attorney General
State of Hawaii

BERTRAM T. KANBARA
NOBUKI KAMIDA
Deputy Attorneys General
State of Hawaii
Iolani Palace Grounds
Honolulu, Hawaii 96813

THURMAN ARNOLD
DENNIS G. LYONS
JOHN T. RIGBY
BROOKSLEY ELIZABETH LANDAU
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Attorneys for John A. Burns,
Governor of the State of Hawaii

Of Counsel:

ARNOLD & PORTER
Washington, D. C.

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APPENDICES

APPENDIX A

Constitutional and Statutory Provisions

1. U. S. Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Article III of the Constitution of the State of Hawaii

THE LEGISLATURE

SECTION 1. The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent wtih this constitution or the Constitution of the United States.

SECTION 2. The senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. The districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: that portion of the island of Hawaii known as Puna, Hilo and Hamakua, five;

Second senatorial district: that portion of the island of Hawaii known as Kau, Kona and Kohala, two;

Third senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, five;

Fourth senatorial district: that portion of the island of Oahu lying east and south of Nuuanu Street and Pali Road and the upper ridge of the Koolau Range from the Nuuanu Pali to Makapuu Point and all other islands not specifically enumerated, five;

Fifth senatorial district: that portion of the island of Oahu lying west and north of the fourth senatorial district, five; and

Sixth senatorial district: the islands of Kauai and Niihau, three.

SECTION 3. The house of representatives shall be composed of fifty-one members, who shall be elected by the qualified voters of the respective representative districts. Until the next reapportionment, the representative districts and the number of representatives to be elected from each shall be as set forth in the Schedule.

SECTION 4. On or before June 1 of the year 1959, and of each tenth year thereafter, the governor shall reapportion the members of the house of representatives in the following manner: The total number of representatives shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, on the basis of the number of voters

registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of representatives to which each basic area is entitled, such total shall be reapportioned among the one or more representative districts within each basic area on the basis of the number of voters registered at the last preceding general election within each of such representative districts and computed by the method known as the method of equal proportions, no representative district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any representative district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the house is entitled, then, as part of such reapportionment, the basic area within which such representative district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new representative district therein shall be more than one-half of such quotient.

The governor shall thereupon issue a proclamation showing the results of such reapportionment, and such reapportionment shall be effective for the election of members to such house for the next five succeeding legislatures.

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty; and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment.

SECTION 5. The members of the legislature shall be elected at general elections. The term of office of members of the house of representatives shall be two years beginning with their election and ending on the day of the next general election, and the term of office of members of the senate shall be four years beginning with their election and ending on the day of the second general election after their election.

* * *

SECTION 11. Regular sessions of the legislature shall be held annually. The governor may convene the legislature, or the senate alone, in special session. All sessions shall be held at the capital of the State. In case the capital shall be unsafe, the governor may direct that any session shall be held at some other place. Regular sessions in odd numbered years shall be known as "general sessions" and regular sessions in even numbered years shall be known as "budget sessions".

* * *

Regular sessions shall commence at 10:00 o'clock a.m., on the third Wednesday in February. General sessions shall be limited to a period of sixty days and budget sessions and special sessions to a period of thirty days, but the governor may extend any session for not more than thirty days. Sundays and holidays shall be excluded in computing the number of days of any session.

3. Article XV of the Constitution of the State of Hawaii

REVISION AND AMENDMENT

SECTION 1. Revisions of or amendments to this constitution may be proposed by constitutional convention or by the legislature.

SECTION 2. The legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" If any ten-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period.

If a majority of the ballots cast upon such question be in the affirmative, delegates to the convention shall be chosen at the next regular election unless the legislature shall provide for the election of delegates at a special election.

Notwithstanding any provision in this constitution to the contrary, other than Section 3 of Article XIV, any qualified voter of the district concerned shall be eligible to membership in the convention.

Unless the legislature shall otherwise provide, there shall be the same number of delegates to such convention, who shall be elected from the same areas, and the convention shall be convened in the same manner, as nearly as practicable, as required for the Hawaii State Constitutional Convention of 1950.

The convention shall determine its own organization and rules of procedure. It shall be the sole judge of the elections, returns and qualifications of its members and, by a two-thirds vote, may suspend or remove any member for cause. The governor shall fill any vacancy by appointment of a qualified voter from the district concerned.

The convention shall provide for the time and manner in which the proposed constitutional revision or amendments shall be submitted to a vote of the electorate, but no such revision or amendments shall be effective unless approved at a general election by a majority of all of the votes tallied

upon the question, such majority constituting at least thirty-five percent of the total vote cast at such election, or at a special election by a majority of the total vote tallied upon such question, such majority constituting at least thirty-five percent of the total number of registered voters; provided, that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties.

The provisions of this section shall be self-executing, but the legislature shall make the necessary appropriations and may enact legislation to facilitate their operation.

SECTION 3. The legislature may propose amendments to the constitution by adopting the same, in the manner required for legislation, by a two-thirds vote of each house on final reading at any session, after either or both houses shall have given the governor at least ten days' written notice of the final form of the proposed amendment, or, with or without such notice, by a majority vote of each house on final reading at each of two successive sessions.

Upon such adoption, the proposed amendments shall be entered upon the journals, with the ayes and noes, and published once in each of four successive weeks in at least one newspaper of general circulation in each senatorial district wherein such a newspaper is published, within the two months' period immediately preceding the next general election.

At such general election the proposed amendments shall be submitted to the electorate for approval or rejection upon a separate ballot.

The conditions of and requirements for ratification of such proposed amendments shall be the same as provided

in Section 2 of this article for ratification at a general election.

SECTION 4. No proposal for amendment of the constitution adopted in either manner provided by this article shall be subject to veto by the governor.

4. Article XVI of the Constitution of the State of Hawaii

SCHEDULE

Representative Districts

SECTION 1. As provided in Section 3 of Article III until the next reapportionment, the representative districts and the number of members to be elected from each shall be as follows:

First representative district: that portion of the island of Hawaii known as Puna, one representative;

Second representative district: that portion of the island of Hawaii known as South Hilo, four representatives;

Third representative district: that portion of the island of Hawaii known as North Hilo and Hamakua, one representative;

Fourth representative district: that portion of the island of Hawaii known as Kau and South Kona and that portion of North Kona, for convenience herein referred to as Keauhou, more particularly described as follows: from a point at the seashore between the lands of Holualoa 1 and 2 and Puapuaa 2 running northeasterly along the boundary of Holualoa 1 and 2 to Puu Laalaau; (2) easterly in a straight line to a point called "Naohueelleua" being the

common corner of the lands of Puuanahulu, Kaohe and Keauhou 2nd; (3) southeasterly along the common boundary between Hamakua and North Kona districts to the summit of Mauna Loa; (4) westerly along the common boundary between Kau and North Kona districts to the easterly boundary of South Kona district; (5) northerly and westerly along the boundary between North and South Kona districts to the seashore; and (6) northerly along the seashore to the point of beginning, one representative;

Fifth representative district: that portion of the island of Hawaii known as Kohala and that portion of North Kona not included in the fourth representative district, one representative;

Sixth representative district: the islands of Mologai and Lanai, one representative;

Seventh representative district: the islands of Maui and Kahoolawe, five representatives;

Eighth representative district: that portion of the island of Oahu known as Koolaupoko and Koolauloa, two representatives;

Ninth representative district: that portion of the island of Oahu, for convenience herein referred to as Waialua and Wahiawa and a portion of Ewa known as Kunia and Waipio, more particularly described as follows: Beginning at the seashore on the boundary between the Ahupuaas of Waimea and Pupukea and following along the North boundary of the Ahupuaa of Waimea to Puu Kainapuaa on the Koolau Range at the junction of the Ahupuaas of Laie, Waimea and Kawailoa, thence southeasterly along the top of the Koolau Range, passing over Puu Pauao and Puu

Kaaumakua to the head of Kipapa Gulch, thence down along Kipapa Gulch in all its turnings and windings to Waiahole Ditch, thence southwesterly along Waiahole Ditch in all its turnings and windings to Reservoir No. 31 of the Oahu Sugar Company, thence following a direct line to Puu Palikea on the Waianae Mountain Range, thence northwesterly following along the top of Waianae Mountain Range, passing over Puu Kaua, Puu Kanehoa, Puu Hapapa, Puu Kumakalii, Puu Kalena, Puu Kaala to Puu Pueo, thence westerly along the boundary between the Ahupuaas of Kaena and Keawaula to the seashore at Kaena Point, thence easterly along the seashore to the point of beginning, two representatives;*

Tenth representative district: that portion of the island of Oahu, for convenience herein referred to as Ewa, (excluding Kunia and Waipio) and Waianae, more particularly described as follows: Beginning at the seashore at Kaena Point, on the boundary between the Ahupuaas of Kaena and Keawaula, and following along said boundary to Puu Pueo on the Waianae Mountain Range, thence southeasterly along the top of the Waianae Mountain Range, passing over Puu Kaala, Puu Kalena, Puu Kumakalii, Puu Hapapa, Puu Kanehoa, Puu Kaua to Puu Palikea, thence following a direct line to Reservoir No. 31 of the Oahu Sugar Company, thence northeasterly along Waiahole Ditch in all its turnings and windings to Kipapa Gulch, thence up along Kipapa Gulch in all its turnings and windings to the top of the Koolau Range, thence southeasterly along the top of the Koolau Range to the boundary between the Ahupuaas of

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* The boundaries of the Ninth and Tenth representative districts were changed by amendments proposed by the Legislature and ratified by the electorate in 1962. The descriptions of both districts are shown above in their amended form.

Halawa and Moanalua, thence southwesterly along the boundary between the Ahupuaas of Halawa and Moanalua to the seashore, thence westerly along the seashore to the point of beginning, two representatives;*

Eleventh representative district: that portion of the island of Oahu, for convenience herein referred to as Kalihi, more particularly described as follows: from the intersection of Kalihi and Auiki Streets running westerly along Auiki Street to Mokauea Street; (2) southwesterly along Mokauea Street Extension extended to a point on the outer edge of the reef; (3) westerly along the outer edge of the reef to a point on the Moanalua-Halawa boundary; (4) northerly and northeasterly along the Moanalua-Halawa boundary to the top of Koolau Range; (5) southeasterly along the top of Koolau Range to a place called "Puu Lanihuli"; (6) southwesterly along the top of the ridge between the lands of Kalihi, Kapalama and Nuuanu to Kalihi Street; and (7) southwesterly along Kalihi Street to the point of beginning, three representatives;

Twelfth representative district: that portion of the island of Oahu, for convenience herein referred to as upper Nuuanu, more particularly described as follows: from the intersection of King and Kalihi Streets running northeasterly along Kalihi Street to the ridge between the lands of Kalihi, Kapalama and Nuuanu; (2) northeasterly along the top of said ridge to a point on the Koolau Range called "Puu Lanihuli"; (3) easterly along the top of said Range to Pali Road at the Nuuanu Pali; (4) southwesterly along Pali Road to Nuuanu Avenue and southwesterly along

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* The boundaries of the Ninth and Tenth representative districts were changed by amendments proposed by the Legislature and ratified by the electorate in 1962. The descriptions of both districts are shown above in their amended form.

Nuuanu Avenue to School Street; (5) northwesterly along School Street to the center line of the Kapalama Drainage Canal (Waikiki Branch); (6) southwesterly along said Canal to the center line of the main Kapalama Drainage Canal; (7) southwesterly along said Canal to King Street; and (8) northwesterly along King Street to the point of beginning, three representatives;

Thirteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kapalama, more particularly described as follows: from the junction of the Honolulu Harbor Channel and the reef running westerly along the outer edge of the reef to Mokauea Street Extension extended; (2) northeasterly along Mokauea Street Extension extended to Sand Island Road; (3) northeasterly along Mokauea Street Extension to Auiki Street; (4) easterly along Auiki Street to Kalihi Street; (5) northeasterly along Kalihi Street to King Street; (6) southeasterly along King Street to the center line of the main Kapalama Drainage Canal; (7) northerly along said Canal to the center line of the Kapalama Drainage Canal (Waikiki Branch); (8) northeasterly along said Canal to School Street; (9) southeasterly along School Street to Nuuanu Avenue; (10) southwesterly along Nuuanu Avenue to the sea; and (11) southwesterly along the middle of Honolulu Harbor and Honolulu Harbor Channel to the point of beginning, three representatives;

Fourteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Pauoa, more particularly described as follows: from the junction of the Honolulu Harbor Channel and the outer edge of the reef running northeasterly along the middle of Honolulu Harbor Channel and Honolulu Harbor to the

intersection of Queen Street and Nuuanu Avenue; (2) northeasterly along Nuuanu Avenue to Pali Road and northeasterly along Pali Road to the top of the Koolau Range at the Nuuanu Pali; (3) easterly and southerly along the top of the Koolau Range to a point called "Puu Konahuanui"; (4) southwesterly along the top of the ridge between the lands of Nuuanu, Pauoa and Manoa to a mountain peak called "Puu Ohia" or "Tantalus"; (5) southwesterly along the top of the ridge between the lands of Makiki and Kalawahine to the intersection of Nehoa Street and Lewalani Drive; (6) southerly along Lewalani Drive and Piikoi Street to Wilder Avenue; (7) easterly along Wilder Avenue to Punahou Street; (8) southerly along Punahou Street to King Street; (9) westerly along King Street to Kalakaua Avenue; (10) southerly along Kalakaua Avenue to the center line of the Ala Wai Canal; (11) westerly along said Canal and along the line of said Canal extended to the outer edge of the reef; and (12) westerly along the outer edge of the reef to the point of beginning. five representatives;

Fifteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Manoa and Waikiki, more particularly described as follows: from the intersection of Kalakaua Avenue and the center line of the Ala Wai Canal running northerly along Kalakaua Avenue to King Street; (2) easterly along King Street to Punahou Street; (3) northerly along Punahou Street to Wilder Avenue; (4) westerly along Wilder Avenue to Piikoi Street; (5) northerly along Piikoi Street to Lewalani Drive; (6) northerly along Lewalani Drive to Nehoa Street; (7) northeasterly along the top of the ridge between the lands of Makiki and Kalawahine to a mountain peak called "Puu Ohia" or "Tantalus"; (8) northeasterly along

the top of the ridge between the lands of Pauoa, Manoa and Muuanu to a point on the Koolau Range called "Puu Konahuanui"; (9) southeasterly along the top of said Range to a place called "Mt. Olympus"; (10) southwesterly along the top of Waahila Ridge to the top edge of Palolo Valley; (11) southwesterly along the top edge of said Valley to the forest reserve boundary; (12) southwesterly along the southeasterly boundary of St. Louis Heights Tract, Series 2 (File Plan 464) to the southerly boundary of said Tract 100 feet southeasterly from Alencastre Street; (13) southwesterly parallel to and 100 feet from Alencastre Street and St. Louis Drive to Waialae Avenue; (14) westerly along Waialae Avenue to Kapahulu Avenue extended; (15) southerly across Waialae Avenue and along Kapahulu Avenue to Kalakaua Avenue; (16) westerly along Kapahulu Avenue extended to the outer edge of the reef; (17) northwesterly along the outer edge of the reef to a point on the line extended of the center line of the Ala Wai Canal; and (18) easterly along said line to the point of beginning, six representatives;

Sixteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kaimuki and Kapahulu, more particularly described as follows: from a point at the seacoast at a place called "Black Point" running westerly along the seacoast to Kapahula Avenue extended to the sea; (2) easterly across Kalakaua Avenue and easterly and northerly along Kapahula Avenue to Waialae Avenue; (3) easterly along Waialae Avenue to a point 100 feet easterly of St. Louis Drive; (4) northeasterly across Waialae Avenue then parallel to and 100 feet from St. Louis Drive and Alencastre Street to the southerly boundary of St. Louis Heights Tract, Series 2 (File Plan No. 464); (5) northeasterly along the

southeasterly boundary of said Tract to the forest reserve boundary; (6) northeasterly along the top ridge of Palolo Valley to the top of Waahila Ridge; (7) northeasterly along the top of Waahila Ridge to a point on Koolau Range called "Mt. Olympus"; (8) easterly along the top of the Koolau Range to the top of the ridge between the lands of Waialae Nui and Palolo; (9) southwesterly along the top of said ridge to a place called "Kalepeamoa"; (10) southwesterly along Mauumae Ridge to Sierra Drive; (11) southwesterly along Sierra Drive to Waialae Avenue; (12) easterly along Waialae Avenue to 13th Avenue; (13) southwesterly along 13th Avenue and Ocean View Drive to Kilauea Avenue; (14) westerly along Kilauea Avenue to Makapuu Avenue; (15) southwesterly along Makapuu Avenue to Diamond Head Road; and (16) southeasterly along Diamond Head Road to the Military Road and along the Military Road extended to the point of beginning, four representatives;

Seventeenth representative district: that portion of the island of Oahu not included in any other representative district on the island of Oahu, together with all other islands not included in any other representative district, three representatives;

Eighteenth representative district: the islands of Kauai and Niihau, four representatives.

Wherever a roadway, or the intersection of one or more roadways, is designated as a boundary in any of the above descriptions, the center line of such roadway or intersection is intended as such boundary.

5. Hawaii House Bill No. 987, 3d Legislature (1965)

SECTION 1. *Senate; Districts; Composition.* The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

"Senate; Districts; Composition

Section 2. The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: the island of Hawaii, three;

Second senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, two;

Third senatorial district: that portion of the island of Oahu consisting of the eighth representative district as described in the Schedule, Article XVI, Section 1, of the Constitution of the State of Hawaii, as amended, three;

Fourth senatorial district: that portion of the island of Oahu consisting of the ninth and tenth representative districts as described in the said Schedule and the first and the eighth precincts of the eleventh representative district as described in the governor's proclamation issued September 11, 1964, for the 1964 general election, four;

Fifth senatorial district: that portion of the island of Oahu consisting of the twelfth and thirteenth representative districts as described in the said Schedule and the second through seventh precincts, inclusive, and the ninth through twelfth precincts, inclusive, of the eleventh representative district, and the first through fifth precincts, inclusive, and the eighth, eleventh, fifteenth and sixteenth precincts of the fourteenth representative district as described in the said proclamation, four;

Sixth senatorial district: that portion of the island of Oahu consisting of the fifteenth representative district as described in the said Schedule and the sixth, seventh, ninth and tenth precincts and the twelfth through fourteenth precincts inclusive, of the fourteenth representative district as described in the said proclamation, four;

Seventh senatorial district: that portion of the island of Oahu consisting of the sixteenth and seventeenth representative districts as described in the said Schedule, four;

Eighth senatorial district: the islands of Kauai and Niihau, one."

SECTION 2. On or before June 1, of the year 1975, and of each tenth year thereafter, the governor shall reapportion the members of the senate in the following manner: The total number of senators shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau on the basis of the number of voters registered at the last preceding general election in each of such basic areas and

computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of senators to which each basic area is entitled, such total shall be reapportioned among the one or more senatorial districts within each basic area on the basis of the number of voters registered at the last preceding general election within each of such senatorial districts and computed by the method known as the method of equal proportions, no senatorial district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any senatorial district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the senate is entitled, then, as part of such reapportionment, the basic area within which such senatorial district lies shall be redictricted by the governor in such manner that the total number of voters registered in each new senatorial district therein shall be more than one-half of such quotient, provided, however, that there shall be at least one senatorial district in each basic area.

Upon completion of the reapportionment of the senate as provided herein, the governor shall issue a proclamation showing the results thereof.

Except as otherwise provided hereinafter, the initial reapportionment shall be effective for the election of members to the senate in 1976 and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect. Except as otherwise provided hereinafter, any subsequent reapportionment shall be effective for the election of members to the senate in the year next following such reapportionment and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect.

An incumbent senator whose term of office does not expire until the second general election following the date of the proclamation, including any such senator whose seat has been apportioned to another district by reapportionment, shall be allowed to complete his four-year term; provided that when the seat of such holdover senator has been reapportioned to another district, the election to fill the new seat in the district to which such seat has been newly apportioned shall not be held until the time of the second election following such proclamation.

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty; and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment.

SECTION 3. The terms of all members of the senate elected or appointed prior to the general election of 1966 shall terminate on the date of the general election of 1966.

Members of the senate elected at the general election of 1966 shall be divided into two classes.

Members of the first class shall hold office for a term of four years beginning with their election and ending on the day of the second general election held thereafter.

Members of the second class shall hold office for a term of two years beginning with their election and ending on the day of the next general election held thereafter.

Upon the expiration of the aforesaid terms of office of members of the respective classes, the term of office of their successors shall be four years.

Of the members to which each senatorial district is entitled, one-half shall be members of the second class.

If the total number of senators to which a senatorial district is entitled is not an even number, the number of members of the first class in such district shall be the quotient of said total number divided by two, rounded off to the next whole number. The remainder shall be members of the second class. Membership in the first and second classes shall be determined by the number of votes cast for each senator in such district. The first class shall consist of those senators, in number corresponding with the number of members of the first class to which such district is entitled, who are elected with the highest number of votes from such district. The remaining senators elected shall constitute the second class.

The senator from a senatorial district that is entitled to one senator shall automatically be a member of the first class.

SECTION 4. This Act shall take effect upon approval by the Governor of the State of Hawaii and by the United States District Court for the District of Hawaii and shall remain in effect until superseded by constitutional amendment; provided that the regular election of 1966, shall be the first election held pursuant to the provisions herein.

6. Hawaii House Bill No. 773, 3d Legislature (1965)

SECTION 1. Article III, Section 2 of the Constitution of the State of Hawaii shall be amended to read as follows:

"Senate; Districts; Composition

Section 2. The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the

number of senators to be elected from each, shall be as follows:

First senatorial district: the island of Hawaii, three;

Second senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, two;

Third senatorial district: that portion of the island of Oahu consisting of the eighth representative district as described in the Schedule, Article XVI, Section 1, of the Constitution of the State of Hawaii, as amended, three;

Fourth senatorial district: that portion of the island of Oahu consisting of the ninth and tenth representative districts as described in the said Schedule and the first and the eighth precincts of the eleventh representative district as described in the governor's proclamation issued September 11, 1964, for the 1964 general election, four;

Fifth senatorial district: that portion of the island of Oahu consisting of the twelfth and thirteenth representative districts as described in the said Schedule and the second through seventh precincts, inclusive, and the ninth through twelfth precincts, inclusive, of the eleventh representative district, and the first through fifth precincts, inclusive, and the eighth, eleventh, fifteenth and sixteenth precincts of the fourteenth representative district as described in the said proclamation, four;

Sixth senatorial district: that portion of the island of Oahu consisting of the fifteenth representative district as described in the said Schedule and the sixth, seventh, ninth and tenth precincts and the twelfth through fourteenth precincts, inclusive, of the four-

teenth representative district as described in the said proclamation, four;

Seventh senatorial district: that portion of the island of Oahu consisting of the sixteenth and seventeenth representative districts as described in the said Schedule, four;

Eighth senatorial district: the islands of Kauai and Niihau, one."

SECTION 2. Article III of the Constitution of the State of Hawaii shall be amended by adding thereto a new section, to be designated "Section 2.1" next following Section 2 thereof, to read as follows:

"Reapportionment of Senate

Section 2.1. On or before June 1 of the year 1975, and of each tenth year thereafter, the governor shall reapportion the members of the senate in the following manner: the total number of senators shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, on the basis of the number of voters registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of senators to which each basic area is entitled, such total shall be reapportioned among the one or more senatorial districts within each basic area on the basis of the number of voters registered at the last preceding general election within each of such senatorial districts and com-

puted by the method known as the method of equal proportions, no senatorial district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any senatorial district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the senate is entitled, then, as part of such reapportionment, the basic area within which such senatorial district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new senatorial district therein shall be more than one-half of such quotient, provided, however, that there shall be at least one senatorial district in each basic area.

Upon completion of the reapportionment of the senate as provided herein, the governor shall issue a proclamation showing the results thereof.

Except as otherwise provided hereinafter, the initial reapportionment shall be effective for the election of members to the senate in 1976 and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect. Except as otherwise provided hereinafter, any subsequent reapportionment shall be effective for the election of members to the senate in the year next following such reapportionment and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect.

An incumbent senator whose term of office does not expire until the second general election following the date of the proclamation, including any such senator whose seat has been apportioned to another district by reapportionment, shall be allowed to complete his four-year term; provided that when the seat of such

holdover senator has been reapportioned to another district, the election to fill the new seat in the district to which such seat has been newly apportioned shall not be held until the time of the second election following such proclamation.

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment."

SECTION 3. Article III, Section 5, of the Constitution of the State of Hawaii shall be amended by substituting a semicolon for the period at the end of the second sentence thereof and adding the following thereafter:

"provided that members of the senate elected at the general election of 1966 shall be divided into two classes. Members of the first class shall hold office for a term of four years beginning with their election and ending on the day of the second general election held thereafter. Members of the second class shall hold office for a term of two years beginning with their election and ending on the day of the next general election held thereafter. Upon the expiration of the aforesaid terms of office of members of the respective classes, the term of office of their successors shall be four years. Of the members to which each senatorial district is entitled, one-half shall be members of the second class. If the total number of senators to which a senatorial district is entitled is not an even number,

the number of members of the first class in such district shall be the quotient of said total number divided by two, rounded off to the next whole number. The remainder shall be members of the second class. Membership in the first and second classes shall be determined by the number of votes cast for each senator in such district. The first class shall consist of those senators, in number corresponding with the number of members of the first class to which such district is entitled, who are elected with the highest number of votes from such district. The remaining senators elected shall constitute the second class. The senator from a senatorial district that is entitled to one senator shall automatically be a member of the first class."

SECTION 4. Article XV, Section 2, of the Constitution of the State of Hawaii shall be amended by substituting a period for the semicolon in the sixth paragraph thereof and by deleting from the sixth paragraph the proviso at the end of said paragraph, which reads:

"provided, that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties."

SECTION 5. The foregoing amendments shall take effect upon compliance with the provisions of Article XV, Section 3, of the Constitution of the State of Hawaii; provided that the proviso now in Article XV, Section 2, paragraph 6, shall not be applicable.

7. Act 334 of the Session Laws of Hawaii, Regular Session of 1949

SECTION 1. In order that Hawaii may be admitted in the Union on an equal footing with the original states, a convention for the purpose of forming a constitution and state government and otherwise preparing for such admission as a state shall be held, and the acts of said convention shall be submitted for ratification by the people, as provided in this Act.

For the purposes of this Act and the carrying out of its provisions:

(a) The limits of the proposed state shall be taken to be the area now constituting this Territory, as at present described.

(b) The laws of the proposed state at the time of its admission into the Union shall be deemed to comprise all laws then in force in the Territory of Hawaii, except as modified or changed by the constitution of the state or by ordinance of the constitutional convention duly ratified by the people, or by any Act of the Congress of the United States providing for the admission of said state.

SECTION 2. All citizens of the United States who have the qualifications for voters for representatives to the Territorial Legislature are hereby authorized to vote for and choose delegates to the convention. Such delegates shall possess the qualifications of such electors.

The convention shall consist of sixty-three delegates apportioned among the representative districts within the limits of the proposed state on the following basis:

First representative district, two delegates at large and in addition thereto one delegate each from precincts com-

bined as follows: Precincts 1, 2, 3, 4, 5, 6, 7, and 36; precincts 8, 9, 10, 11, and 35; precincts 12, 13, 14, and 33; precincts 15, 16, 30, 17, and 34; precincts 18, 19, 20, 21, 31, and 22; precincts 23, 32, 24, 25, 26, 27, 28, and 29;

Second representative district, two delegates at large and in addition thereto one delegate each from precincts combined as follows: Precincts 1, 2, 3, 4, 5, 6, 7, 8, and 16; precincts 9, 10, 11, 12, 13, 14, and 15;

Third representative district, three delegates at large and in addition thereto one delegate each from precincts combined as follows: Precincts 1, 2, 3, 4, and 5; precincts 6, 7, 8, 10, and 11; precincts 9, 12, 13, and 28; precincts 14, 15, 16, and 17; precincts 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27; precincts 29, 30, 31, 32, 33, and 34;

Fourth representative district, which for all purposes of this section shall exclude precincts 28 and 38 thereof, six delegates at large and in addition thereto two delegates each from precincts combined as follows: Precincts 25, 26, 27, 23, 22, 21, 20, and 19; precincts 24, 16, 15, 32, 17, 18, and 11; precincts 6, 36, 14, 13, 12, and 7; precincts 35, 5, 34, 31, and 8; precincts 4, 30, 33, 3, 9, and 10; precincts 1, 2, 29, and 37;

Fifth representative district, which for all purposes of this section shall include precincts 28 and 38 of the fourth district, six delegates at large and in addition thereto two delegates each from precincts combined as follows: Precincts 28 and 38, fourth district, and precincts 1, 2, 3, and 4, fifth district; precincts 5, 7, 30, and 31, fifth district; precincts 6, 29, 8, 9, 10, and 32, fifth district; precincts 11, 26, 14, 15, 16, 12, 13, and 33; precincts 18, 19, 20, 21, and 27, fifth district; precincts 17, 28, 22, 23, 24, and 25, fifth district;

Sixth representative district, two delegates at large and in addition thereto one delegate each from precincts combined as follows: Precincts 1, 2, 3, and 4; precincts 5 and 6; precincts 8, 9, 10, and 11; and one delegate from precinct 7.

The precincts herein mentioned are as they existed on November 2, 1948.

APPENDIX B

Memorandum to Judge Pence from Judge Beeks

MEMORANDUM

TO: Judge Pence DATE: March 31, 1965

FROM: Judge Beeks

SUBJECT: *Holt* v. *Richardson*

I discussed your proposed Decision and Order on Senate Reapportionment Plan of March 18, 1965, and your notes accompanying the same, in a telephone conference with Judge Jertberg on March 29th. Judge Jertberg, because of the fact that he was in Los Angeles without a secretary, asked me to convey to you our joint views, which are as follows:

1. Inasmuch as the Senate Reapportionment Plan of March 18, 1965, is not formally before us, we do not think that any decision and order should be filed because such decision and order would be purely advisory in nature.

2. We believe that the Senate should be redistricted into single senatorial districts, although we may approve two-member districts if and only if the legislature can affirmatively show substantial reasons therefor. There may very well be valid reasons for one or two 2-member districts in the neighboring islands but we perceive no justification whatsoever for other than single member districts on the Island of Oahu, particularly the heavily populated areas thereof.

We have no objection whatsoever to your making our views, as above expressed, informally known to all of the parties but we are opposed to the entry of a written decision and order.

I again discussed this matter with Judge Jertberg, who is now back in Fresno, this morning, read him this memorandum and he signified his approval and concurrence.

It is our suggestion that you discuss the subject matter of this memorandum with counsel for all parties immediately upon receipt of same (I hope you receive it tomorrow) and thereafter arrange a conference call with both of us (Judge Jertberg will be in Fresno) at noon your time on Friday.

cc: Judge Jertberg
Fresno, Calif.